TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 19[redacted]

No. [redacted] 282

UNITED RAILROADS OF SAN FRANCISCO, APPELLANT,

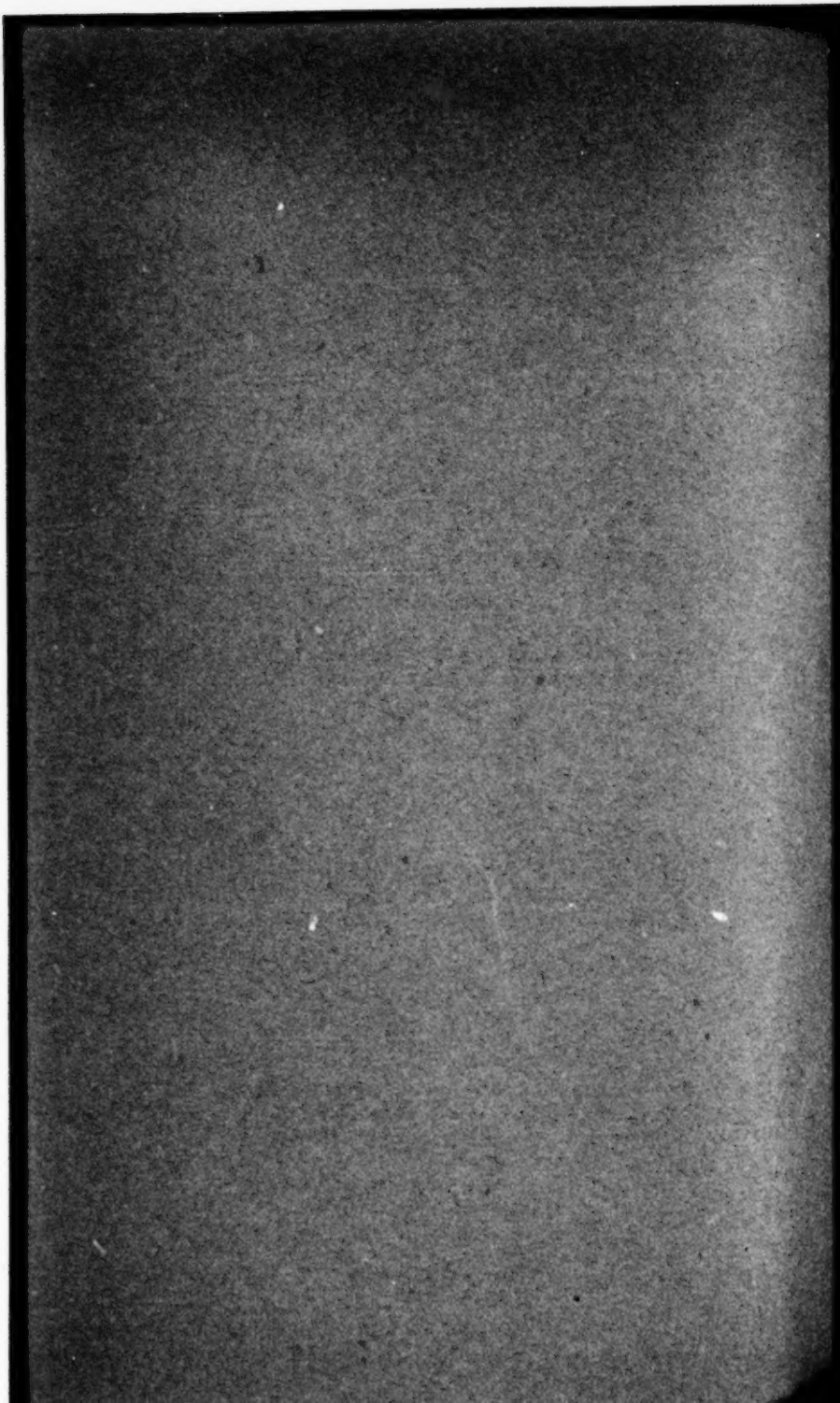
vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 24, 1917.

(26,170)



(26,170)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 703.

UNITED RAILROADS OF SAN FRANCISCO, APPELLANT,

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

versus

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward L. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Bill of Complaint for Injunction.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of California, in
2 Chancery Sitting:

The United Railroads of San Francisco, a corporation, brings this its Bill of Complaint against the City and County of San Francisco, a Municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a Municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon,

Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation, and respectfully represents to your Honors as follows:

I.

That your orator is, and ever since the 4th day of March, 1902, has been, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business and offices in the City and County of San Francisco, in the Northern District of California.

That each and all of the defendants herein named, save
3 and except the City and County of San Francisco, a Municipal corporation, are residents of the City and County of San Francisco, in the Northern District of California, and citizens of the State of California.

II.

That the defendant City and County of San Francisco was in the year 1870, ever since has been, and now is, a Municipal corporation and a body politic and corporate, and one of the political subdivisions of the State of California, organized and existing under and by virtue of the Constitution and Laws of the State of California, and known and designated by the name of the City and County of San Francisco;

That by an act of the Legislature of the State of California entitled, "An Act Concerning Street Railroads," approved March 29th, 1870, and as amended by the said Legislature of the State of California April 4th, 1870, and in and by virtue of Section 497 of the Civil Code of the State of California, approved March 21st, 1872, and as the same was amended by the Legislature of the State of California March 3rd, 1876, the State of California delegated and conferred upon the Board of Supervisors of the said City and County of San Francisco the right to grant to a corporation the right and authority to construct and operate street railroads for the period of fifty years through the streets and public highways in said City and County, and under certain conditions and provisions as provided in said acts of the Legislature, to which reference is hereby specially made;

That the defendant James Rolph, Jr., is now, and ever since the 8th day of January, 1916, has been, the duly elected, qualified and acting Mayor of said City and County of San Francisco;

That at all the times since the 8th day of January, 1916,
4 the defendants Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward

L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks have been and now are the duly elected, qualified and acting members of the Board of Supervisors of said City and County of San Francisco.

That the defendants T. A. Reardon, Daniel G. Fraser and Adolph Judell are now and were at all the times herein mentioned and complained of the duly appointed, qualified and acting members of the Board of Public Works of the defendant City and County of San Francisco, and that they do now constitute, and did at all times herein mentioned and complained of constitute, the Board of Public Works of said City and County of San Francisco;

That the defendant Thomas A. Cashin is now, and at all the times herein mentioned and complained of was, the duly appointed, qualified and acting Superintendant of all the Municipal Railways of said City and County of San Francisco, and particularly of the Municipal Railway over and along and upon Church Street and over, along and upon Van Ness Avenue in said City and County of San Francisco, and is now, and was at all said times, in the executive control of said Municipal Railways;

That the defendant M. M. O'Shaughnessy is now, and was at all the times herein mentioned and complained of, the duly appointed, qualified and acting City Engineer of the defendant City and County of San Francisco, a Municipal corporation, and appointed by said T. A. Reardon, Daniel G. Fraser and Adolph Judell as and constituting the said Board of Public Works of the City and County of San Francisco.

III.

That the Market Street Railway Company of San Francisco was on September 15th, 1879, a corporation duly organized and existing under and by virtue of the laws of the State of California; that said Market Street Railway Company of San Francisco was created and organized for the purpose of constructing, owning and operating street railroads, particularly in the City and County of San Francisco, and ever since its incorporation has been, and up to the times herein mentioned was, actively engaged in constructing, owning and operating street railroads in said City and County of San Francisco;

That your orator was created and organized for the purpose, among other things, of constructing, owning and operating street railroads in the City and County of San Francisco and the County of San Mateo, and ever since its incorporation has been and now is actively engaged in constructing, owning and operating street railroads in said City and County of San Francisco and County of San Mateo.

IV.

That your orator is the owner and holder of real and personal property situate in the City and County of San Francisco, State of

California, assessed and liable to be assessed for taxes and to have taxes levied thereon for the purpose of providing revenues for the support of the municipal government of said City and County of San Francisco, and more particularly for the purpose of providing a sinking fund in the treasury of said City and County to pay the interest accruing upon and to redeem at their maturity at full face value any bond or bonds which may be issued by the said City and County for the acquisition, construction or completion
6 of the railroad by the defendant, City and County of San Francisco, as more specifically hereinafter set forth; that your orator is now and at all said times has been an ad valorem taxpayer of the City and County of San Francisco; that for the fiscal year ending June 30th, 1916, your orator has been assessed for taxes on nonoperative property, and has paid to the City and County of San Francisco as and for said taxes, the sum of $7,114.76; that said assessment of $7,114.76 does not include but is exclusive of the percentages due and payable to said defendant City and County of San Francisco under the various franchises now owned and possessed by your orator and under which it is running and operating its railway system in the City and County of San Francisco; that in addition to said sum your orator has paid to the State of California as and for taxes levied on its operative property within the City and County of San Francisco for the fiscal year ending June 30th, 1916, the sum of $439,938.86; that for the calendar year ending December 31st, 1914, your orator paid to the said defendant City and County of San Francisco during that year and the year 1915 as a percentage of the receipts of lines operated under said franchises the sum of $48,970.29; that for the calendar year ending December 31st, 1915, your orator will pay to said defendant City and County of San Francisco as a percentage of the receipts from lines operated under said franchises under which your orator is operating its said railway system in said City and County a sum substantially the same as that for the year 1914 as hereinabove set forth; that the statement of the amount due thereunder has not yet been made or accepted by said City and County, but your orator is liable therefor and will pay the same to said City and County immediately upon the acceptance by said City and County of the amount thereof as shown by the statements to be filed therefor.

That in addition to the payments hereinabove set forth
7 your orator prays an annual license tax on the cars operated by it in said City and County of San Francisco, and for the year ending December 31st, 1915, your orator has paid said City and County of San Francisco as and for a license tax upon said cars aforesaid the sum of $9,300.00.

V.

That on the 15th day of September, 1879, the Board of Supervisors of the said City and County of San Francisco was a body to whom was entrusted the government of said City and County of San Francisco, and upon whom had been delegated by the State of Cali-

fornia through its Legislature the authority to grant franchises to persons or corporations to operate and maintain street railroads and lay railroad tracks through the streets and public highways of said City and County of San Francisco, as is also above set forth;

That heretofore, to-wit, on or about the 15th day of September, 1879, the Board of Supervisors of said City and County of San Francisco duly and regularly passed an ordinance known and designated as Order No. 1514, entitled, "Granting to the Market Street Railway Company of San Francisco certain rights and privileges therein specified," under and by virtue of the provisions of which said order said City and County of San Francisco did grant unto the said Market Street Railway Company of San Francisco, its successors and assigns, a franchise, right of way and privilege to construct, lay down, maintain and operate, for the term of fifty years from and after the date of the passage of said order, a single or double track street railroad along and upon certain streets in said City and County of San Francisco, and more particularly, among others: Commencing at the City Front on Market Street, and thence along Market Street to 17th Street; that on, to-wit, the 20th day of September, 1879, the Mayor of said City and County approved said order
8 in the manner provided by law; that a copy of said order is hereunto attached, marked "Exhibit A," and is hereby specifically referred to and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

That on or about the 29th day of May, 1882, the Board of Supervisors of the City and County of San Francisco duly and regularly passed an ordinance known and designated as Order No. 1676, entitled, "To amend Section One of Order No. 1514, granting to the Market Street Railway Company of San Francisco certain rights and privileges therein specified, approved September 20th, 1879," under and by virtue of the provisions of which said order said City and County of San Francisco did amend Section One of said Order No. 1514 herein in this paragraph referred to, and under and by virtue of which said order Section One thereof was amended so as to make the term thereof to run for fifty years from and after the date of passage thereof; that thereafter and on, to-wit, June 5th, 1882, the Mayor of said City and County approved said order in the manner provided by law; that a copy of said order is hereto attached, marked "Exhibit B," and is hereby specifically referred to and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

VI.

That said Market Street Railway Company of San Francisco duly accepted the franchises granted by said Orders 1514 and 1676, (Exhibits A and B herein), and within ten days after the passage of order 1514 did file in the office of the clerk of the Board of Supervisors of the City and County of San Francisco its said acceptance in writing of the provisions of said Order 1514, as required by Section
12 thereof, which said acceptance in writing was under the

9 corporate seal of said Market Street Railway Company of San Francisco, signed by the President and countersigned by the Secretary thereof.

VII.

That thereafter and within the time limited by said orders and by law said Market Street Railway Company of San Francisco did perform all the conditions on its part required by said orders or by law to be performed, and more particularly did commence and complete the construction of a double track street railroad along and upon Market Street in said City and County, Commencing at the City Front and along and upon Market Street, crossing Van Ness Avenue and Oak Street, Franklin and Page Streets, Rose Avenue, Gough and Haight Streets, Octavia and Waller Streets, Laguna and Hermann Streets, Buchanan Street and Duboce Avenue, Reservoir Street and 14th Street to 17th Street.

VIII.

That on or about the 31st day of May, 1882, the said Market Street Railway Company of San Francisco did assign, transfer and convey unto the Market Street Cable Railway Company all its right, title and interest in and to said franchises, privileges and rights of way heretofore referred to as Orders 1514 and 1676 (Exhibits A and B herein); that thereupon said Market Street Cable Railway Company did enter into the possession and enjoyment of all the rights, privileges and franchises theretofore possessed, exercised and enjoyed by said Market Street Railway Company of San Francisco, and more particularly did enter upon the construction, maintenance and operation along and upon said Market Street in said City and County of San Francisco from the City Front on Market Street to 17th Street, as aforesaid, of a double track street railroad, and from
10 said date was the owner and in the enjoyment and possession and entitled to the enjoyment and possession of all of said rights, privileges and franchises, and more particularly of the right, privilege and franchise to maintain and operate along and upon said streets said double track street railroads, and continued in said enjoyment and possession down to and including the 13th day of October, 1893, as hereinafter more particularly set forth and alleged.

IX.

That on or about the 13th day of October, 1893, the several capital stocks, debts, properties, assets and franchises of the Market Street Cable Railway Company and certain other street railway corporations were consolidated and amalgamated into one corporation under the name and style of the Market Street Railway Company, and articles of consolidation, amalgamation and incorporation were filed in the office of the Secretary of State of the State of California on the 14th day of October, 1893; that a copy of said articles of con-

solidation, amalgamation and incorporation is hereunto annexed, marked "Exhibit C," and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full. That immediately thereafter the said Market Street Railway Company entered into the possession of said Orders Nos. 1514 and 1676, and the railroads constructed and operated thereunder, and continued in the possession and operation thereof down to and including the 18th day of March, 1902, as hereinafter more particularly set forth and alleged.

X.

That heretofore, to-wit, on or about the 15th day of April, 1895, the said Board of Supervisors of said City and County of San Francisco duly and regularly passed an order known and desig-
11 nated as Order No. 2858 entitled, "Granting to the Market Street Railway Company, its successors and assigns, certain rights and privileges herein specified," under and by virtue of the provisions of which said order the said Market Street Railway Company, its successors and assigns, was granted a franchise, right of way and privilege to construct, maintain, lay down and operate, for the unexpired terms of the respective franchises heretofore granted on the streets between which the connections in said order referred to are to be made, a single or double track street railroad along and upon certain streets in said City and County of San Francisco, and more particularly, among others: Commencing from a connection with the line of the Market Street Railway Company on 16th Street at or near its intersection with Church Street, thence along and upon Church Street to Ridley Street (now Duboce Avenue), thence along and upon Ridley Street (now Duboce Avenue) to Fillmore Street to a connection with the line of the Market Street Railway Company on Fillmore Street at or near its intersection with Ridley Street (now Duboce Avenue). That a copy of said order is hereto attached, marked "Exhibit D," and is hereby specifically referred to and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full;

XI.

That said Market Street Railway Company duly accepted the franchises granted by said Order No. 2858 (Exhibit D herein), and on to-wit April 26th, 1895, did file in the office of the clerk of the Board of Supervisors of said City and County of San Francisco an acceptance in writing of the provisions of said order as required by Section 6 thereof.

XII.

That thereafter and within the time required by law the
12 said Market Street Railway Company did perform all the conditions on its part required by said orders or by law to be per-

formed, and more particularly did commence and complete the construction of a double track street railroad along and upon Church Street from 16th Street to Ridley Street (now Duboce Avenue), thence along and upon Ridley Street (now Duboce Avenue) to Fillmore Street to a connection with the line of said Market Street Railway Company on Fillmore Street at or near its intersection with Ridley Street (now Duboce Avenue), and immediately thereafter continued in the possession and operation of the double track street railroad thereon down to and including the 18th day of March, 1902, as hereinafter more particularly set forth and alleged.

XIII.

That thereafter and on or about the 18th day of March, 1902, your orator United Railroads of San Francisco became the owner of and went into the possession of all the right, title and interest in and to the said franchises, rights of way and privileges hereinbefore referred to as Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), and thereupon your orator did enter into the possession and enjoyment of all the rights, privileges and franchises theretofore possessed, exercised and enjoyed by said Market Street Railway Company of San Francisco and Market Street Railway Company, its successors and assigns, in said orders named, and more particularly did enter upon the maintenance and operation of street railroads along and upon Market Street, Commencing at the City Front on Market Street, thence along Market Street to 17th Street, and also Commencing at the intersection of 16th and Church Streets, thence over and along Church Street to Ridley Street (now Duboce Avenue),
13 thence along and upon Ridley Street (now Duboce Avenue) to Fillmore Street, there connecting with the line of street railway on Fillmore Street, and ever since has been and now is the owner and in the enjoyment and possession and entitled to the enjoyment and possession of all the rights of way, privileges and franchises, and more particularly of the rights of way, privileges and franchises to maintain and operate along and upon said streets said double track street railroad, and ever since has been and now is so maintaining and operating the same.

XIV.

That said franchises, grants, privileges and rights of way so granted as aforesaid by said City and County of San Francisco, referred to in Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), were so granted and accepted upon the express condition and provision that it should be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation than to the grantee named in each of said orders, and no more, the right to use the street or streets named therein for a distance of five blocks, and no more; and said grants, franchises, rights of way and privileges were made upon the terms and conditions

specified in Section 499 of the Civil Code of the State of California as the said section existed in said Civil Code at the date of the passage and adoption of said orders, which said section of said Civil Code is in the terms and figures following, to-wit:

"499. Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

And in this connection your orator alleges that Section 5
14 of Order 1514 (Exhibit A herein), granting the right to build, construct and operate a street railroad along Market Street, Commencing at the City Front on Market Street, thence along Market Street to 17th Street, is in the terms and figures following, to-wit:

"Sec. 5. It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the civil code of this State. This section shall apply to persons and companies, as well as corporations."

XV.

That Market Street from Van Ness Avenue to and past Church Street is crossed and intersected on the northerly side thereof by the following streets: Franklin and Page Streets, Rose Avenue, Gough and Haight Streets, Octavia and Waller Streets, Laguna and Hermann Streets, Buchanan Street and Duboce Avenue, Reservoir Street and 14th Street; and the southerly side thereof by 12th Street, Brady Street, Valencia Street, Hermann Street, Pearl Street, Guerrero Street, Duboce Avenue, Dolores Street and 14th Street; that Church Street from Market Street to 16th Street is crossed and intersected by 14th Street and 15th Street; and the distance from the intersection of Van Ness Avenue and Market Street along Market Street to Church Street and thence along Church Street to 16th Street is more than five blocks.

XVI.

That on, to-wit, the 16th day of July, 1913, the Board of Supervisors of the City and County of San Francisco ordered a special election to be held in the City and County of San Francisco on the
26th day of August, 1913, for the purpose of submitting to
15 the electors of said City and County the proposition, among other things, to incur a bonded indebtedness by said City and County of San Francisco for the construction by said City and County of a street railroad over and along the following streets, to-wit:

On Van Ness Avenue, and from such avenue along connecting streets to Church street, and along Church street to convenient terminals;

That at said election said proposition was carried by a vote of the electors voting at said election as required by law.

XVII.

That thereafter and on, to-wit, the 8th day of February, 1915, the Board of Supervisors of the City and County of San Francisco adopted an ordinance known as Bill No. 3410, Ordinance No. 3110 (New Series), wherein and whereby it is ordained, that the Board of Public Works is authorized, instructed and empowered to immediately prepare plans, specifications and contracts, and advertise for bids for furnishing the additional materials necessary for the construction of a Municipal Railway system for which funds were provided in the bond issue authorized August 26th, 1913, as aforesaid, along the following streets, to-wit:

Connecting with the tracks of the Van Ness avenue street railway at Market street, thence along Market street to Church street, thence along Church street to Eighteenth street, thence by a diversion through the westerly side of Mission Park to Twentieth street and Church street, thence across a right of way to be acquired through private property between Twentieth and Twenty-second streets to Twenty-second and Church streets, thence along Church street to Thirtieth street.

That a copy of said Ordinance No. 3110 (New Series) is hereunto annexed, marked "Exhibit E," and expressly made a part hereof. That thereafter said Bill No. 3410, Ordinance No. 3110 (New Series), and on, to-wit, February 17th, 1915, was approved
16 by the Mayor of said City and County of San Francisco.

XVIII.

That the defendants have declared by said Ordinance No. 3110 (New Series), (Exhibit E herein), that they intend to construct, build and operate a Municipal Street Railway from the intersection of Market Street and Van Ness Avenue, thence westerly along Market Street crossing 12th Street, Page and Franklin Streets, Rose Avenue, Brady Street, Haight and Gough Streets, Valencia Street, Octavia and Waller Streets, Pearl Street, Laguna and Hermann Streets, Guerrero Street, Buchanan Street and Duboce Avenue, Dolores Street, Reservoir Street, 14th Street to and into Church Street, thence along and upon Church Street passing 14th Street, 15th Street and 16th Street; that the distance from the intersection of Van Ness Avenue and Market Street thence westerly along Market Street to the intersection of Church and Market Streets, thence along and upon Church Street to 16th Street, is more than five blocks, and said proposed Municipal Railway line, if so constructed, run, and operated, will be so constructed, run and operated for a distance of more than five blocks over Market Street and Church Street, upon which your orator United Railroads of San Francisco has already built, constructed and is now running and operating its street railroad as aforesaid.

XIX.

That the distance from the intersection of Van Ness Avenue and Market Street along Market Street to Church Street, thence along and upon Church Street to 16th Street, is and will be over, along and upon the same street along and upon which the State of California, by and through the City and County of San Francisco, granted the franchise, right of way and privilege to construct and operate a street railroad, as set forth in Order No. 1514 and Order No. 2858
17 (Exhibits A and D herein), and across and intersecting the railroad tracks of your orator laid and maintained under Orders 1514, 1676 and 2858 (Exhibits A, B and D herein) at 16th and Church Streets, and in order to build, construct, run and operate said line of said Municipal Street Railway as declared and set forth herein it will be necessary for said City and County of San Francisco to cut the tracks and rails laid by your orator under Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein) at the intersection of Church and Market Streets and at the intersection of 16th and Church Streets and at the intersection of Van Ness Avenue and Market Street, for the purpose of crossing the tracks of your orator now laid at said intersections under Orders 1514, 1676 and 2858 (Exhibits A, B and D herein).

XX.

That on, to-wit, the 1st day of May, 1916, the Board of Supervisors of said City and County of San Francisco adopted the resolution known as Resolution 12,887 (New Series), wherein and whereby it is resolved that the Board of Public Works be directed to proceed without delay to complete said Church Street Railway from Church and 16th Streets to Market Street and thence along Market Street to Van Ness Avenue there connecting with the tracks of the Municipal Railway on Van Ness Avenue, in accordance with the provisions of Ordinance No. 3110 (New Series), (Exhibit E herein), such construction to consist of double tracks laid outside of the rails of the railroad of your orator, and such overhead electrical construction and appurtenances as may be necessary; that a copy of said Resolution 12,887 (New Series) is hereunto annexed, marked "Exhibit F," and hereby made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

18 XXI.

That on, to-wit, the 15th day of May, 1916, the said Board of Supervisors of said City and County of San Francisco adopted Bill No. 4059, Ordinance No. 3736 (New Series), and approved by the Mayor of said City and County on, to-wit, May 16th, 1916, entitled:

"Ordering and Providing for the construction of an extension of the Municipal Railway system along Market Street from the easterly

portal of the Twin Peaks Tunnel to Church Street and from Van Ness Avenue to the existing Municipal Railway tracks in Market Street at Seventh Street."

wherein and whereby the Board of Public Works was directed to prepare plans and specifications for the construction of an extension of the Municipal Railway system to consist of double tracks, crossovers, switches, and the like, and the necessary overhead electrical appurtenances from the easterly portal of the Twin Peak Tunnel along Market Street to Church Street connecting with the tracks of the Municipal Railway in Van Ness Avenue, thence along Market Street and connecting with the tracks of the Municipal Railway in Market Street near Kearny Street. That such construction should consist of double tracks laid outside of the railroad of your orator on Market Street from Kearny and Market Streets to 17th Street; that a copy of said Bill No. 4059, Ordinance No. 3736 (New Series) is hereunto annexed, marked "Exhibit G" and hereby made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

That your orator is operating a street railroad along 10th Street crossing Market Street into Polk Street, and along Ninth Street crossing Market Street into Larkin Street, and along Sixth Street crossing Market Street into Taylor Street, and along Fourth Street crossing Market Street into Ellis Street, and along Third Street crossing Market Street into Kearny Street.

19 XXII.

That your orator has never consented, and does not now consent, to the building, construction, running or operation of said Municipal Street Railway so to be built, constructed, run and operated by said defendants from the intersection of Market Street and Van Ness westerly along Market Street to Church Street, thence along Church Street to 16th Street, or upon the tracks of your orator on Market Street running from the intersection of Van Ness Avenue and Market Street to and across the intersection of Church and Market Streets, thence along Church Street to 16th Street, nor to the cutting of the tracks or rails of your orator laid by your orator at Market and Church Streets, Church and 16th Streets, and Van Ness Avenue and Market Streets under Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), nor to the building, construction, running or operation of the Municipal Railway along Market Street from 17th Street to Kearny Street, nor to the crossing nor cutting of the tracks and rails of your orator laid in Market Street at the intersection of 10th and Market Street-, Ninth and Market Streets, Sixth and Market Streets, Fourth and Market Streets, Third and Market Streets, Kearny and Market Streets, Ellie and Market Streets, Taylor and Market Streets, Larkin and Market Streets and Polk and Market Streets.

XXIII.

That the defendants City and County of San Francisco, the Board of Supervisors, nor any of said defendants, have not undertaken to

institute any proceedings for the purpose of acquiring the properties of your orator United Railroads of San Francisco, as hereinbefore described and set forth, nor any part thereof, nor has the said defendant City and County of San Francisco, through its said
20 Board of Supervisors or otherwise, intituted any proceeding or undertaking to acquire any street railroad of your orator or of any of its predecessors as required by Article XII, Section 2, of the Charter of the City and County of San Francisco, approved by the Legislature of the State of California January 26th, 1899, or any of the amendments thereof approved by said Legislature of the State of California on February 5th, 1903, November 23rd, 1907, February 17th, 1911, March 28th, 1913, or April 1st, 1915. That said Section 2 of said Charter reads as follows:

"Sec. 2. Before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities, the Board of Supervisors must solicit and consider offers for the sale to the City and County of existing utilities, in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

and the said defendant City and County of San Francisco, through its said Board of Supervisors or otherwise, has not heretofore, and does not now, contemplate the acquisition of any of the properties or franchises of your orator, United Railroads of San Francisco;

That said defendant City and County of San Francisco, through its said Board of Supervisors or otherwise, has not made, nor has it offered to make, any arrangement, lease or contract with your orator United Railroads of San Francisco for permission to use the track or tracks of your orator from the intersection of Van Ness Avenue and Market Street along Market Street to the intersection of Church and Market Streets, thence along Church Street to 16th Street, nor from Market and 17th Streets along Market Street to Kearny Street; nor have said defendants nor has any of them made, nor have they nor any of them offered to make, any arrangement, lease or con-
21 tract with your orator United Railroads of San Francisco for permission to cut the tracks or rails of your orator on Market Street or at the intersection of Market Street and Van Ness Avenue or at the intersection of Church and Market Streets or at the intersection of Church and 16th Streets or at the intersection of Tenth and Market Streets, Ninth and Market Streets, Sixth and Market Streets, Fourth and Market Streets, Third and Market Streets, Kearny and Market Streets, Ellis and Market Streets, Taylor and Market Streets, Larkin and Market Streets and Polk and Market Streets; nor have said defendants nor has any of them made, nor have they nor has any of them offered to make, any arrangement, lease or contract with your orator for permission to connect the tracks of the said Municipal Railway line on Church Street with the tracks of your orator at 16th and Church Streets; nor have said defendants nor has any of them made, nor have they nor has any of them offered to make, any compensation to your orator United Railroads of San Francisco for connecting the said Municipal Railway tracks on Church Street with the

tracks of your orator at Church and 16th Streets or for the crossing of the tracks of said Municipal Railway with the tracks of your orator at 16th and Church Streets, Market and Church Streets, Market Street and Van Ness Avenue, or for the crossing of the tracks of said Municipal Railway with the tracks of your orator at Tenth and Market Streets, Ninth and Market Streets, Sixth and Market Streets, Fourth and Market Streets, Third and Market Streets, Kearny and Market Streets, Ellis and Market Streets, Taylor and Market Streets, Larkin and Market Streets and Polk and Market Streets.

XXIIII.

That if said defendants build and construct said Municipal Railway outside of the tracks and rails of your orator on Church
22 Street from 16th to Market Street, thence crossing the tracks of your orator at Market Street, thence along Market Street and outside the rails and tracks of your orator on Market Street to Van Ness Avenue, thence crossing the tracks and rails of your orator at Van Ness Avenue and connecting with the rails and tracks of the Municipal Railway on Van Ness Avenue, or if said defendants build and construct said Municipal Railway outside of the tracks and rails of your orator on Market Street from 17th Street to and across Third Street, as they by said ordinances threaten to do, there will then be constructed and laid and running close to and parallel with one another four tracks of railway on said Church Street between 16th Street and Market Street and on Market Street between 16th Street and Van Ness Avenue and on Market Street from 17th Street to and across Third Street; and if said defendants operate the cars of said Municipal Railway on their said tracks so constructed as aforesaid said cars will blanket the cars of your orator operated on Church Street from 16th to Market Street and will blanket the cars of your orator on Market Street from Church Street to Van Ness Avenue, and will blanket the cars of your orator on Market Street from 17th Street to and across Third Street, and will interfere with and cause great danger to passengers desiring to board and leave the cars of your orator on said streets, and will prevent your orator from enjoying full use of the said franchises on said streets granted to it as herein set forth, and will impede and delay the progress of its said cars, cause greatly increased and continuous expense of operation, and otherwise greatly interfere with the operation of your orator's said cars over said streets and the full exercise and enjoyment of said franchises. And in this connection your orator alleges that it is operating street rail-
23 way lines over and along Market Street from 17th Street to and across Third Street and over and along Valencia Street from Market Street to Mission Street, and over and along Haight Street from Market Street to and beyond Stanyan Street, which last two said lines converge into Market Street and connect with the tracks of your orator on Market Street, and all of which said lines continuously carry a large number of passengers from what is known as the Mission District in said City and County and the

Western Addition and Sunset District in said City and County to different points on Market Street, to the Ferry at the foot of Market Street, and to other points throughout said City and County of San Francisco. That said interference in enjoyment of the said franchises so granted to your orator as aforesaid and the blanketing of its said cars operated over said streets as aforesaid, and the interference with the boarding and the alighting of passengers from the cars of your orator on said streets as aforesaid, will cause your orator a large increase in expense and loss of income from said lines and from the operation, use and enjoyment of its said franchises, the amount of which it is impossible to determine, but which will be greatly in excess of $3,000; that said loss is a continuing one, and your orator will continue to suffer therefrom indefinitely unless said defendants and each of them are restrained and enjoined by this Court as hereinafter prayed for.

XXV.

That said defendants and each of them will, unless enjoined and restrained by your Honors, operate said cars over said Church Street and along said Market Street to Van Ness Avenue, crossing the lines of your orator at 16th and Church Streets, at Market and Church Streets, and at Market Street and Van Ness Avenue,
24 and over and along Market Street from 17th Street to and across Third Street and crossing the lines of your orator at Tenth and Market Streets, Ninth and Market Streets, Sixth and Market Streets, Fourth and Market Streets, Third and Market Streets and at Kearny and Market Streets, Ellis and Market Streets, Taylor and Market Streets, Larkin and Market Streets and Polk and Market Streets, without regard to the time schedules and headway established by your orator for the operation of its cars over said streets as aforesaid; but, on the contrary, will operate their said cars according to their own time schedules and headway, thus seriously interfering with and disarranging the time schedules and headway of the cars of your orator operating over said streets as aforesaid, and impeding and delaying the operation of your orator's cars on said streets, and causing serious congestion of cars and traffic generally, particularly at street crossings, and rendering it impracticable for your orator to operate its said cars according to its established time schedules and headway under its said franchises, and seriously interfering with the service which your orator desires to give to the public of the City and County of San Francisco and with the proper and regular service on its said railway. That the obstruction, congestion and delay caused by such action on the part of said defendants will cause your orator's operating expenses of its said cars operating on said streets as aforesaid to be largely increased.

XXVI.

That your orator, as the successor of the Market Street Railway Company and as the successor of other street railway companies

theretofore owning and operating street railways in the City and County of San Francisco and in the County of San Mateo acquired by your orator, did, on or about the 7th day of June, 1902,
25 make provision for the purchase, assignment and exchange of the mortgage debts, if any, existing of the Market Street Railway Company and of the other street railway companies so acquired, and did in exchange therefor duly and legally issue its own bonds aggregating the sum of $25,409,000, and did include, among other things, as security for the payment and redemption of said bonds issued by your orator, all of the rights, privileges, immunities and franchises which your orator possesses, claims, owns or is entitled to, including the franchises granted to your orator's predecessors in interest as hereinabove alleged and particularly set forth; that a part of the security for each and every outstanding bond of your orator is the franchises owned by your orator as successor in interest to the Market Street Railway Company of San Francisco and Market Street Railway Company, and embracing the lines of street railway along Market Street, commencing at the City Front on Market Street, thence along Market Street to 17th Street, and along Church Street from Market Street to 16th Street, all in said City and County of San Francisco.

XXVII.

That there are at present outstanding and in the hands of third parties, purchased in good faith and for value received, said bonds of your orator and of your orator's predecessors in interest, amounting in the aggregate to a sum upwards of $25,409,000; that the proceeds and moneys derived from the sale of said outstanding bonds have been used by your orator or its predecessors in interest for the purpose, among other things, of purchasing the properties and franchises of the Market Street Railway Company, one of the predecessors in interest of your orator, and of other railway companies so acquired by your orator, as above set forth, and for the construc-
26 tion and equipment of the railroads of your orator in the City and County of San Francisco and the County of San Mateo.

XXVIII.

That unless restrained and enjoined from so doing, as herein prayed, the defendants and respondents herein threaten to and will proceed to construct and operate a street railroad in said City and County of San Francisco from Market and 17th Streets along Market Street to and across Third Street, crossing the tracks of your orator at Tenth and Market Streets, Ninth and Market Streets, Sixth and Market Streets, Fourth and Market Streets, Third and Market Streets, and at Kearny and Market Streets, Ellis and Market Streets, Taylor and Market Streets, Larkin and Market Streets, Polk and Market Streets, and from the intersection of Van Ness Avenue and Market Street, crossing the tracks of your orator at Van Ness Avenue and Market Street, thence along Market Street

to the intersection of Market and Church Streets, crossing the tracks of your orator at Market and Church Streets and at Market and Van Ness Avenue, as aforesaid, and will cut the tracks and rails of your orator at the intersection of Market Street and Van Ness Avenue, at Market and Church Streets, at Church and 16th Streets, and at the intersection of Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, and at Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, and Market and Polk Streets, so as to permit the tracks of said Municipal Street Railway line to cross the tracks of your orator laid and constructed upon said streets as aforesaid;

That unless enjoined as herein prayed, said construction of said tracks of said Municipal Street Railway as aforesaid, and
27 the operation of said proposed street railroad by the defendant, City and County of San Francisco, along, over and across the tracks of your orator from the intersection of Van Ness Avenue and Market Street, along Market Street to the intersection of Church and Market Streets, and along Church Street to 16th Street, and along Market Street from 17th Street to and across Third Street, will be carried into effect and will cause continued and irreparable damage to your orator, and will occasion a constantly recurring grievance and injury against which your orator is without recourse except by the intervention of this Honorable Court in equity by process of injunction;

That your orator has no plain, adequate or complete remedy at law, and irreparable loss and damage will result to your orator unless a temporary restraining order is granted herein.

XXIX.

That unless enjoined as herein prayed, the threatened action of said defendants City and County of San Francisco and its officers, defendants and respondents herein, their agents and representatives, in the proposed construction and operation of the street railroad as aforesaid, will depreciate the value of your orator's property, will decrease the value of its bonds, will impair the obligation of the contract entered into by the State of California through the authority delegated by it to the City and County of San Francisco in the grant by it to your orator under franchises numbered 1514, 1676 and 2858 (herein referred to and marked "Exhibit A," "Exhibit B" and "Exhibit D," respectively), and will be taking the property of your orator without due process of law and in violation of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

28 XXX.

That the Market Street Railway Company of San Francisco and the Market Street Railway Company and your orator, United Railroads of San Francisco, accepted the franchises, rights of way

and privileges granted under Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), in good faith, relying upon their contracts with the City and County of San Francisco and the State of California, and your orator, as the successor in interest of each of the above named companies and persons acquired said franchises and each of them, and accepted their and each of their terms, conditions and impositions in like good faith, and particularly your orator and its predecessors in interest did, in the acceptance of said franchises, rights of way and privileges, and in the building of said street railways thereunder, expend large sums of money relying upon the good faith of the said State of California and the said City and County of San Francisco in the carrying out of their said contracts with your orator and its predecessors in interest, and in particular reliance upon that clause of said contract that two railroad corporations and no more might occupy and use the same street or tracks with your orator for a street railway for a distance of five blocks and no more;

That after the acquisition by your orator of the franchises, rights of way and privileges herein referred to your orator expended large sums of money in repairs and reconstruction of said tracks and railway, built, constructed and operated under said franchises as aforesaid, in reliance upon its said contract with said State of California and the City and County of San Francisco, and in particular reliance upon the clause of said contracts that two railroad corporations and no more might occupy and use the
29 same street or tracks for a street railway for a distance of five blocks and no more;

That the defendant City and County of San Francisco has already acquired the track for its Municipal Railway and is now operating for more than five blocks on Market Street, to-wit, on Market Street from Kearny Street to the Embarcadero in said City and County, and is now operating by electricity by means of the overhead trolley system cars over said tracks for more than five blocks on Market Street, to-wit, from said Kearny Street to said Embarcadero;

That said defendant City and County of San Francisco is now operating a line of street railway on Van Ness Avenue connecting with Geary Street in said City and County, and that if the proposed line of railway is built along Church Street to Market Street, thence along Market Street to Van Ness Avenue, there connecting with the tracks of said defendant City and County of San Francisco on Van Ness Avenue, the said defendant City and County of San Francisco can, and as your orator is informed and believes and therefore alleges does threaten to, run through cars from the terminus of the said Church Street line at Church and 30th Streets, thence along Church to Market Street, thence along Market to Van Ness Avenue, thence along Van Ness Avenue to Geary Street, thence along Geary to Market and Kearny Streets, and thence along Market Street to the Embarcadero, thus making said railway line and route one continuous line which already includes more than five blocks on Market Street but which, with the blocks added between Van Ness Avenue and Church Street, would make the said distance upwards of fifteen

blocks. That the distance on Market Street between 17th Street and the Embarcadero is more than five blocks, to-wit, upwards, of twenty-six blocks.

30

XXXI.

That the defendant and respondent, City and County of San Francisco, in now attempting to construct and operate its street railway as hereinabove set forth, is seeking to and will impair the obligation of the contract of your orator and each of the above named railway corporations with the State of California and said City and County of San Francisco, and is likewise seeking to and will impair the obligation of the contracts of your orator and each of the above named railway corporations with the State of California and the City and County of San Francisco by becoming a competitor in the business of owning and operating a street railway along the streets as hereinabove set forth;

XXXII.

That when said Market Street Railway Company of San Francisco, Market Street Railway Company and your orator, United Railroads of San Francisco, accepted the rights, privileges and franchises granted by said Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), they and each of them did so relying upon their and each of their contracts with said City and County of San Francisco and said State of California that not more than two lines of railway would be permitted to use the same street for a distance of five blocks on any of the streets named in said franchises or orders, and particularly from the intersection of Van Ness Avenue and Market Street, thence along Market Street to Church Street, thence along Church Street to 16th Street, and from Market and 17th Street-, thence along Market Street to the Embarcadero; and furthermore did so in the belief that the City and County of San Francisco would not itself become a competitor in the railway business along any of the streets named in said orders or

31

franchises and particularly along said streets aforesaid; and the City and County of San Francisco and the State of California, acting through it, well knew that the said predecessors in interest of your orator, in expending moneys for the construction and equipment of said railroads, would not, nor would your orator, have expended money in the construction and equipment of said railroads if the said predecessors in interest of your orator and your orator had believed that the City and County of San Francisco would have undertaken to construct and operate a railroad along any of the streets named in the orders or franchises herein referred to, and particularly from the intersection of Van Ness Avenue and Market Street, thence along Market Street to Church and Market Streets, thence along Church Street to 16th Street, and from Market and 17th Streets along Market to the Embarcadero, and become a competitor of your orator in the street railway business along said streets as aforesaid.

XXXIII.

Your orator further alleges that the amount in controversy in this suit largely exceeds the sum and value of $3,000, exclusive of interest and costs; that the damage to the property of your orator, unless the defendants and respondents and each of them are enjoined as herein prayed, will be greatly in excess of $3,000, with interest and costs.

Forasmuch, therefore, as your orator is remediless in the premises and cannot have adequate relief except in a court of equity, and to the end that said City and County of San Francisco, a Municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-officio President of the Board of Supervisors thereof, the Board of Supervisors of
32 the City and County of San Francisco, a Municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation, who are made defendants and respondents to this, your orator's bill of complaint, may, if they can, show why your orator should not have have the relief hereby prayed, and to the best and utmost of their knowledge, remembrance, information and belief full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged, but not under oath, their and each of their answers under oath being hereby expressly severally waived; and that the defendants and respondents, and each and every one of them, and their and each of their legal representatives, agents, employees, and servants, or any or either of them, be immediately enjoined and restrained by the decree of this Honorable Court, until the further order of this Court, from constructing its said Municipal Street Railway line on Market Street from 17th Street to and across Third Street and from the intersection of Van Ness Avenue and Market Streets,
33 thence along Market Street to the intersection of Church and Market Streets, thence along Church Street to 16th Street, and from cutting any of the tracks or rails of your orator at the intersection of Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets,

Market and Third Streets, Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, Market and Polk Streets, Market Street and Van Ness Avenue, at Market and Church Streets, and at Church and 16th Streets; and be likewise enjoined and restrained from carrying out or consummating or taking any steps or measures to carry out or consummate the surveying, constructing for the survey, building, owning or operating or constructing any line or lines of street railroad in the City and County of San Francisco over and along Market Street commencing at the intersection of Market and 17th Streets, thence along Market Street to and across Third Streets, or commencing at the intersection of Market Street and Van Ness Avenue, thence along Market Street to the intersection of Market and Church Streets, thence along Church Street to 16th Street, and from cutting or crossing any of the tracks or rails of your orator at 16th and Church Streets or at Market and Church Streets, or at Market Street and Van Ness Avenue, or at Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, and Market and Polk Streets; and that upon the final hearing thereof such injunction be made permanent and perpetual; and that it be decreed that said proposed construction, ownership, or operation of the line or lines of street railroad over and along
34 Market Street commencing at the intersection of Market and 17th Streets, thence along Market Street to and across Third Street, and also commencing at the intersection of Market Street and Van Ness Avenue, thence along Market Street to the intersection of Market and Church Streets, thence al ng Church Street to 16th Street, and the cutting of the tracks and rails of your orator at 16th and Church Streets, Market and Church Streets, Market and Van Ness Avenue, and at Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, and at Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, Market and Polk Streets, and the connecting of the tracks of said Municipal Railway at 16th and Church Streets with the tracks of your orator on said streets by the defendant City and County of San Francisco and each and all of the defendants and respondents herein, their legal representatives, officers, servants, employees and agents, are, and each of them is, unauthorized and illegal; and for such other, further and additional relief in the premises as equity may require and to your Honors may seem meet; and for costs;

May it please your honors to grant unto your orator, United Railroads of San Francisco, a writ of injunction conformable to the prayer of this Bill, and also a writ of subpœna of the United States of America directed to the said defendants and respondents, and each of them, commanding them, and each of them, on a certain day therein named and under a certain penalty, to appear and answer unto this Bill of Complaint, and to abide by and perform

such order and decree in the premises as to the Court may
35 seem meet and proper; and your orator will ever pray, etc.

GARRET W. McENERNEY,
WM. M. ABBOTT AND
WM. M. CANNON,
Solicitors for the Above-named Complainant.

36 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Jesse W. Lilienthal, being first duly sworn according to law, deposes and says: That he is an officer, to-wit, President, of the complainant United Railroads of San Francisco, named in the foregoing bill of complaint, and makes this affidavit as such President on behalf of said complainant corporation; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated upon information or belief, and as to those matters he believes it to be true.

JESSE W. LILIENTHAL.

Subscribed and sworn to before me this 12th day of June, A. D. 1916.

[NOTARIAL SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

37 EXHIBIT A.

Order No. 1514.

Granting to the Market Street Railway Company of San Francisco Certain Rights and Privileges Therein Specified.

The People of the city and county of San Francisco do ordain as follows:

Section 1. The right is hereby granted to the Market Street Railway Company of San Francisco, its successors and assigns, to construct, lay down, maintain and operate, for the term of fifty years, from and after the passage of this order, a single or double track street railroad, with all the necessary switches and turnouts, along and upon the following streets in the city and county of San Francisco, to wit:

First. Commencing at the City Front, on Market street; thence along Market street to Seventeenth street.

Second. Commencing at the intersection of Market and Post streets; thence along Post street to Dupont street; thence along Dupont street to Market street, by and with the consent of the Potrero and Bay View Railroad Company, and not otherwise.

Third. Commencing at the intersection of Market and Fifth streets; thence along Fifth street to Bluxome street; thence along

Bluxome street to the east line of Fourth street, by and with the consent of the Potrero and Bay View Railroad Company, and not otherwise.

Fourth. Commencing at the intersection of Market and McAllister streets; thence along McAllister street to a point within four hundred feet west of the west line of Devisadero street, with switches and tracks running on Fillmore street to the car-house of said Company, situated on the southwest corner of Fillmore and Turk streets.

Fifth. Commencing at the intersection of Market and Hayes streets; thence along Hayes street to Laguna street; thence along Laguna street to McAllister street.

Sixth. Commencing at the intersection of Market and Haight streets; thence along Haight street to Golden Gate Park; and

Seventh. Commencing at the intersection of Market and Valencia streets; thence along Valencia street to Mission street.

38 Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market street Railway Company of San Francisco, and shall be possessed and enjoyed by said Company, upon such terms, conditions and restrictions as are now imposed, or may hereafter be imposed, by the laws of the State of California, and especially the terms, conditions and restrictions imposed by the 498th and 500th and 502d Sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said Company with all of the provisions of said laws is hereby required.

Section 3. It shall be lawful for said Railway Company, its successors and assigns, at its or their option, to propel cars over said railways by the use of horses or mules, or wire ropes running under said streets, and moved by stationary steam-engines; provided that it shall be lawful for said Company, its successors or assigns, to propel cars over said railway on Market street, from the intersection of Valencia street to Seventeenth street, by the use of steam dummies, until otherwise ordered by the Board of Supervisors of the city and County of San Francisco.

Section 4. All railway tracks which have been laid down, and are now being laid down, and are now being operated by said Railway Company upon any of said streets under grants heretofore made by the State of California, or by the people of the city and county of San Francisco; and all tracks which have been laid down on any of said streets by the Potrero and Bay View Railroad Company (said Company assenting hereto) shall be taken, considered and accepted as having been so laid down under and by virtue of the rights hereinbefore granted, and as having been so laid down and constructed in strict compliance with the provisions of this order and the laws aforesaid of the State of California.

39 Section 5. It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and

conditions specified in the 499th section of the civil code of this State. This section shall apply to persons and companies, as well as corporations.

Section 6. Whenever said Railway Company shall elect, as hereinbefore provided, to operate said railways, or either or any of them, in whole or in part, by the use of an endless wire rope or cable and stationary steam engines, it shall be lawful for said Company to make all needful and convenient trenches and excavations in any of said streets under which it proposes to place such rope or cable, and to place in such trenches and excavations all needful and convenient machinery for operating said railways in the manner and by the means aforesaid. It shall also be lawful for said Railway Company to erect and maintain, at convenient and suitable points along the line of the streets under which such wire cables are placed, steam engines and boilers, of ample and sufficient power, and to connect the same with said wire cables. All such trenches and excavations shall be beneath the surface of the street, which surface shall be securely supported, so as not to impair the use and enjoyment of said streets by the public. And the framework of all trenches in which wire cables are placed shall be constructed in a substantial and workmanlike manner, and the slot or aperture opening into such trenches shall not exceed three-fourths of an inch in width.

Section 7. It shall not be lawful for said Railway Company, its successors or assigns, to propel its cars over said railways, or either thereof, at a speed exceeding eight miles per hour, and for each violation of this provision said Railway Company, its successors or assigns, as the case may be, shall be subject to a penalty of one hundred dollars, to be recovered, in any Court of competent jurisdiction, at the suit of the people of the city and county of San Francisco, to the use of the General Fund of said city and county.

Section 8. Whenever it shall be necessary for said Railway Company to plank, or pave, or macadamize its railway tracks as provided in the 498th Section of the Civil Code of this State, it shall use the same material which is, or may be used, by said city and county in respect to the remainder of the street, unless otherwise directed or permitted by the Board of Supervisors of said city and county.

Section 9. The rights and privileges hereby granted shall be deemed to be in addition to and in lieu of all other railway franchises, rights and privileges heretofore granted to said Railway Company by the State of California, or the city and county of San Francisco.

Section 10. Said Railway Company shall pay, in quarterly payments, to the city and county of San Francisco, the sum of fifteen dollars per annum as a license tax upon each car used by it, and no greater sum shall be exacted.

Section 11. The rate of fare for each passenger upon the said railroad, shall not exceed the sum of five (5) cents each way, for any distance over either of the lines of the said railroad, between the

eastern terminus at the City Front and the western and southern terminus as named herein.

Section 12. Said Railway Company is hereby required to file in the office of the Clerk of the Board of Supervisors of the city and county of San Francisco, an acceptance, in writing, of the provisions of this order, under its corporate seal, signed by its President, and countersigned by its Secretary, and thereupon the pro-
41 visions of this order shall be taken and deemed to be a contract between said Company and said city and county. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void.

Section 13. This order shall take effect from and after the date of its passage.

In Board of Supervisors.

San Francisco, September 15, 1879.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Foley, Mangels, Talbert, Danforth, Smith, Rountree, Farron, Scott, Haight, Gibbs, Brickwedel.

Absent—Supervisor Acheson.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, September 20, 1879.

A. J. BRYANT,

Mayor and ex-Officio President Board of Supervisors.

42 EXHIBIT B.

Order No. 1676.

To Amend Section One of Order No. 1514, Granting to the Market Street Railway Company of San Francisco Certain Rights and Privileges Therein Specified, Approved September 20th, 1879.

The People of the City and County of San Francisco do ordain as follows:

Section 1. Section one of said Order No. 1514 is hereby amended to read as follows:

Section 1. The right is hereby granted to the Market Street Railway Company of San Francisco, its successors and assigns, to construct, lay down, maintain and operate, for the term of fifty years, from and after the passage of this Order, a single or double track street railroad, with all the necessary switches and turnouts, along and upon the following streets in the City and County of San Francisco, to wit:

First. Commencing at the City Front, on Market Street; thence along Market street to Seventeenth street.

Second. Commencing at the intersection of Market and Fifth streets; thence along Fifth street to Bluxome street; thence along

Bluxome street to the east line of Fourth street, by and with the consent of the Potrero and Bay View Railroad Company, and not otherwise.

Third. Commencing at the intersection of Market and McAllister streets, thence along McAllister street to Lott street; thence southwest to Fulton street; thence along Fulton street to Stanyan street.

Fourth. Commencing at the intersection of Market and Hayes streets; thence along Hayes street to the westerly line of Stanyan street.

Fifth. Commencing at the intersection of Market and Haight streets; thence along Haight street to Golden Gate Park; and

Sixth. Commencing at the intersection of Market and Valencia streets; thence along Valencia street to Mission street.

43 Section 2. This Order shall be in force from and after its passage.

In Board of Supervisors.

San Francisco, May 29, 1882.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Bodfish, McKew, Shirley, Carmany, Molineux, Torrens, Bradford, Fisher, Merrill, Parrish, Kennedy.

Absent—Supervisor Russ.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, June 5, 1882.

M. C. BLAKE,

Mayor and ex-Officio President Board of Supervisors.

44 EXHIBIT C.

No. —.

STATE OF CALIFORNIA,
Department of State:

I, C. F. Curry, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Consolidation, Amalgamation and of Incorporation of Market Street Cable Railway Company, et al., with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 24th day of August, A. D. 1906.

[SEAL.]

C. F. CURRY,
Secretary of State.
By J. HAND, *Deputy.*

45 *Articles of Consolidation, Amalgamation, and Incorporation of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, City Railroad Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and Ferries and Cliff House Railway Company.*

Articles of consolidation, amalgamation and incorporation made and executed on the 13th day of October, A. D. 1893, by and between the Market Street Cable Railway Company, party of the first part; the Market Street and Fairmount Railway Company, party of the second part; the City Railroad Company, party of the third part; the Potrero & Bay View Railroad Company, party of the fourth part; the Southern Heights and Visitacion Railway Company, party of the fifth part; the Park and Ocean Railroad Company, party of the sixth part; the Ocean Beach Railway Company, party of the seventh part; the Central Railroad Company, party of the eighth part; the Omnibus Cable Company, party of the ninth part; the North Beach and Mission Railway Company, party of the tenth part; and the Ferries and Cliff House Railway Company, party of the eleventh part; all of said parties being railroad corporations duly organized and existing under the laws of the State of California, and having their respective principal places of business in the City and County of San Francisco, in the State of California.

Witnesseth: That whereas, the said party of the first part, the Market Street Cable Railway Company, is the owner of certain street railways in the streets and within the corporate limits of the City and County of San Francisco, in said State, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street to Seventeenth street; also, commencing at the intersection or junction of Market and Fifth streets, there connecting with said Market street line; thence along Fifth street to Bluxome street; thence along Bluxome street to the east line of Fourth street; and thence through private property to Townsend street; also, commencing at the intersection or junction of Market and McAllister streets; there connecting with said Market street line; thence along McAllister street to Lott street; thence southwest to Fulton street; thence along Fulton street and D street to the westerly line of Seventh avenue; also, commencing at the intersection or junction of Market and Hayes streets, there connecting with said Market street line; thence along Hayes street to Stanyan street; also, commencing at the intersection or junc-
46 tion of Market and Haight streets, there connecting with said Market street line; thence along Haight street to Golden Gate Park; also, commencing at the intersection or junction *or* Market and Valencia streets; there connecting with said Market street line; thence along Valencia street to Mission street; the total length of said

railways being, as estimated, thirteen miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the first part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco more particularly described as follows, to-wit: Commencing at the intersection or junction of D street and Seventh avenue; thence along D street to the westerly line of Nineteenth avenue; also commencing at the intersection or junction of Hayes and Stanyan streets; thence along Stanyan street to Fulton street; also commencing at the intersection or junction of Church and Thirtieth streets; thence along Church street and across Market street to the intersection or junction of Church street with Hermann or Kate street; thence westerly along Hermann or Kate street to its intersection with Fillmore street; also, commencing at the intersection of Church and Ridley streets; thence along Ridley street to its intersection with Fillmore street; thence along Fillmore street to the northerly end thereof; also, commencing at the intersection or junction of Illinois and Sixteenth streets; thence along Sixteenth street to Market street; thence along Market street to Seventeenth street; thence along Seventeenth street to Ashbury street; thence along Ashbury street to its junction with Clayton street or the southerly extension thereof; thence along such southerly extension of Clayton street and Clayton street to the northerly line of San Miguel Rancho; thence continuing northerly either along Clayton street or through and across private property to Carl streets; thence across Carl street and through and across private property to the intersection of Cole street with Frederick street; also, commencing at the intersection of Turk and Fillmore streets; thence along Turk street to and upon and across First avenue to B street; thence along B street to Nineteenth avenue; thence along Nineteenth avenue to and upon and across D street to Golden Gate Park; also, commencing at the intersection of Castro and Seventeenth streets, there connecting with the tracks of the Market Street and Fairmount Railway Company; thence along Castro street to Ridley street; thence along Ridley street to Devisadero street; thence along Devisadero street to the northerly end thereof; also, curving from Devisadero street into and along O'Farrell street to a proposed car house on O'Farrell street, between Devisadero and Scott streets; also, commencing at the intersection or junction of Potrero avenue and Twenty-second street; thence along Twenty-second street to Chattanooga street; thence along Chattanooga street to Twenty-fourth street; thence along Twenty-fourth street to Hoffman avenue; also, commencing at the intersection of Twenty-second and Dolores streets; thence along Dolores street to Twenty-fourth street; thence along Twenty-fourth street to and across Chattanooga street; also,
47 commencing at the intersection of Twenty-fourth and Noe streets; thence along Noe street to Jersey street; thence curving into and along Jersey street to the car house of said Market Street Cable Railway Company on Jersey street, between Noe and

Castro streets; also, commencing at the intersection or junction of Market and Seventh streets, there connecting with the tracks of said Market Street Cable Railway Company on Market street; thence along Seventh street to King street; also, commencing at the intersection of Napa and Kentucky streets, there connecting with the tracks of the Southern Heights and Visitacion Railway Company; thence along Napa street to Maryland street; the total length of said last-named railways being, as estimated, nineteen miles, only a portion of which has been constructed:

And whereas, the said party of the second part, the Market Street and Fairmount Railway Company, is the owner of a street railway in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing on Castro street at or near its intersection or junction with Market street; thence along Castro street to Twenty-sixth street; the length of said railway being, as estimated, one mile; and also of all rights, franchises and privileges granted in respect of said railway:

And whereas, the said party of the third part, the City Railroad Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Mission street; thence along Mission street and Mission street road to China avenue; also, commencing at the intersection or junction of Mission and Twenty-ninth streets, there connecting with said Mission street line; thence along Twenty-ninth street to Noe street; also, commencing at the intersection of Mission and Fifth streets; thence along Fifth street to Market street; thence along Market street to Dupont street, or Grant avenue; thence along Dupont street, or Grant avenue, to Sutter street; thence along Sutter street to Market street; thence along Market street to the city front and ferry landings; also, commencing at the intersection of Suttor street and Dupont street, or Grant avenue; thence along Dupont street, or Grant avenue, to Bush street; the total length of said railways being as estimated eight miles, and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the third part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the intersection or junction of China avenue and Mission street or Mission street road; thence in a southerly and southwesterly direction along Mission street and Mission street road and Telegraph or New County road to the southerly boundary line of said city and county; also, commencing at the intersection of Mission and Fourteenth streets,
48 there connecting with the tracks of said City Railroad Company on Mission street; thence along Mission and West Mission streets to Potter street; thence along Potter street to Market street; thence across Market street to Page street; thence along Page street to Masonic avenue; thence along Masonic avenue to Frederick

street; thence along Frederick street to the westerly line of First avenue; also, commencing on West Mission street at a point where the line of Mission street projected northerly would intersect said street; thence northerly across Brady and Market streets to Page street; also, commencing at the intersection or junction of Mission street and Richland avenue; thence along Richland avenue to Andover avenue; thence along Andover avenue to East Park street; thence along East Park street, Holly Park avenue and West Park street to Holly street, and along Holly street from Mission street to Richland avenue; also, commencing at the intersection or junction of Mission street and Cortland avenue; thence along Cortland avenue to Butler street; thence along Butler street to Blaine street; thence along Blaine street to North avenue; thence along North avenue to Cortland avenue, and along California avenue from Cortland avenue to Powell avenue; thence along Powell avenue to Mission street; also along Virginia avenue from California avenue to Mission street; the total length of said last-named railways being as estimated seven miles, only a portion of which has been constructed.

And whereas, the said party of the fourth part, the Potrero and Bay View Railroad Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows; to-wit: Commencing at the intersection or junction of Montgomery and Post streets; thence along Post street to Dupont street or Grant avenue; thence along Dupont street, or Grant avenue to Market street; thence along Market street to Fifth street; also, commencing at the intersection of Fourth and Townsend streets; thence along Fourth street to Berry street; the total length of said railways being as estimated one mile, and also of all rights, franchises and privileges granted in respect of said railways:

And whereas, the said party of the fifth part, the Southern Heights and Visitacion Railway Company, is the owner of a street railway in the streets and within the corporate limits of said City and County of San Francisco described as follows, to-wit: Commencing at the intersection of Fourth and Berry streets; thence along Fourth street to Kentucky street; thence along Kentucky street to Sonoma street; the length of said railway being as estimated two miles, and also of all rights, franchises and privileges granted in respect of said railway:

And the said party of the fifth part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways within the corporate limits of said City and County of San Francisco described as follows, to-wit: Commencing at the intersection of Kentucky and Sonoma streets; thence along Kentucky street to and across Tulare street, Islais Creek channel and Islais street to Railroad avenue; thence along Rail-
49 road avenue to Sixteenth avenue; also, commencing at the intersection of Mission and Sixth streets; thence along Sixth street to Brannan street; thence along Brannan street to Eighth street; thence along Eighth street and across Townsend and Channel streets to Kansas street; thence along Kansas street to Santa Clara street; thence along Santa Clara street to Connecticut street; thence

along Connecticut street to Solano street; thence along Solano street to Kentucky street, there connecting with the line of railway above described on Kentucky street; the total length of said last-named railways being as estimated four miles, only a portion of which has been constructed:

And whereas, the said party of the sixth part, the Park and Ocean Railroad Company, is the owner of a street railway in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing on Stanyan street at its intersection or junction with Haight street; thence along Stanyan street to its intersection with Frederick street; also curving from Stanyan street to the right across Golden Gate Park and Willard street, and through private property and across First avenue to H street; thence westerly along H street to the vicinity of the Great Highway; thence curving northerly and deflecting easterly and across Golden Gate Park to the intersection of D street and Forty-ninth avenue; thence along Forty-ninth avenue to B street; also curving into Waller street from Stanyan street; thence along Waller street to Shrader street; the total length of said railway being as estimated five miles; and also of all rights, franchises and privileges granted in respect of said railway:

And whereas, the said party of the seventh part, the Ocean Beach Railway Company, is the owner of certain rights, franchises and privileges for the construction, maintenance and operation of a street railway in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection or junction of Fell and Stanyan streets; thence along Stanyan street to Fulton street; thence along Fulton street to First avenue; thence along First avenue to Point Lobos avenue; thence along Point Lobos avenue to its junction with the road known as Point Lobos road or Cliff House road; thence along said last-named road to the westerly end thereof; the length of said railway being, as estimated, four miles, only a portion of which has been constructed:

And whereas, the said party of the eighth part, the Central Railroad Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Jackson street; thence along Jackson street to Sansome street; thence along Sansome street to Bush street; thence along Bush street to Kearny street; thence along Kearny street to Post street; thence along Post street to Stockton street; thence along Stockton street to Geary street, thence along Geary street to Taylor street; thence along Taylor street to Market street; thence across Market street to Sixth street; thence along Sixth street to Brannan street; thence along Brannan street to Eighth street; also, commencing at the intersection of Sansome and Bush streets; thence along Bush street to Market street; thence along Market street to the city front and ferry landings; also, commencing at the intersection of Sansome and Pine streets; thence along Pine street to Mar-

ket street; also, commencing at the intersection of Sansome and Washington streets; thence along Washington street to East street; also commencing at the intersection of Geary and Powell streets; thence along Powell street to Market street; also commencing at the intersection of Taylor and Turk streets; thence along Turk street to Devisadero street; also commencing at the intersection of Turk and Fillmore streets; thence along Fillmore street to Post street; also commencing at the intersection of Taylor and Turk streets, there connecting with said line above described on Turk street; thence along Turk street to Market street; thence along Market street to Dupont street or Grant avenue; thence along Dupont street or Grant avenue to Post street; the total length of said railways being as estimated seven miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the eighth part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection of Turk and Devisadero streets; thence along Turk street to First avenue; thence along First avenue to D street; thence along D street to Sixth avenue; also commencing at the intersection of Turk and Baker streets; thence along Baker street to Fell street; thence along Fell street to Stanyan street; the total length of said last-named railways being as estimated three miles, only a portion of which has been constructed.

And whereas, the said party of the ninth part, The Omnibus Cable Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Howard street; thence along Howard street to Twenty-sixth street; also commencing at the intersection or junction of Spear and Market streets; thence along Spear street to Bryant street; also commencing at the intersection of Bryant and First streets; thence along First street to Brannan street; thence along Brannan street to Channel street; thence along Channel street to Potrero avenue; thence along Potrero avenue to Yolo street; thence along Yolo street to Nebraska street; thence along Nebraska street to San Bruno road; thence along San Bruno road to Dwight street; also, commencing at the intersection or junction of San Bruno road with Teneriffe street or Fifteenth avenue; thence along Teneriffe street or Fifteenth avenue to Platte street; also, commencing at the intersection
or junction of Potrero avenue and Twenty-third street; thence
51 along Twenty-third street to Howard street; also commencing at the intersection of Nebraska and Yolo streets; thence along Nebraska street to Sonoma street; thence along Sonoma street to Potrero avenue; thence across Potrero avenue to Twenty-fourth street; thence along Twenty-fourth street to Howard street; also commencing on Townsend street near Fourth street; thence along Townsend street to Third street; thence along Third street to Market street; thence along Market street to Mont-

gomery street; thence along Montgomery street to Washington street; thence along Washington street to Stockton street; thence along Stockton street to Union street; thence along Union street to Montgomery avenue; thence along Montgomery avenue to Powell street; thence along Powell street to Beach street; also commencing at the intersection of Pacific and Stockton streets; thence along Pacific street to Montgomery avenue thence along Montgomery avenue to Montgomery street; thence along Montgomery street to Jackson street; thence along Jackson street to Sansome street; thence along Sansome street to Market street; also commencing at the intersection or junction of Market and Montgomery streets; thence along Market street to the city front and ferry landings; also commencing at the intersection of Jackson and Montgomery streets; thence along Jackson street to Stockton street; also commencing at the intersection of Washington and Montgomery streets; thence along Washington street to Sansome street; also commencing at the intersection or junction of Pine and Market streets; thence along Pine street to Sansome street; also commencing at the intersection of Bush and Sansome streets; thence along Bush street to Market street; also commencing at the intersection of Third and Townsend streets; thence along Third street to Berry street; thence along Berry street to Fifth street; thence along Fifth street to Channel street; also commencing at the junction of Market, Post and Montgomery streets; thence across Market street to Second street; thence along Second street to Brannan street; also commencing at the intersection or junction of Post and Market streets; thence along Post street to Leavenworth street; thence along Leavenworth street to Ellis street; thence along Ellis street to Broderick street; thence along Broderick street to Oak street; also commencing at the intersection of Leavenworth and Ellis streets; thence along Leavenworth street to Park avenue; thence along Park avenue to Grove street; thence along Grove street to Polk street; thence along Polk street to Market street; thence across Market street to Tenth street; thence along Tenth street to Channel street; thence along Channel street to Potrero avenue; also commencing at the intersection of Leavenworth and Ellis streets, there connecting with said line above described on Ellis street; thence along Ellis street to its intersection or junction with Market street; also commencing at the intersection or junction of Market and Fell streets, there connecting with said line above described on Polk street and across Market street to Tenth street; thence along Fell street to Franklin street; thence along Franklin street to Oak street; thence along Oak street to Stanyan street; thence along Stanyan street to Haight street; also commencing at the intersection of Third and Tehama streets;
52 thence along Tehama street to Fourth street; the total length of said railways being as estimated twenty-six miles, and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the ninth part is also the owner of certain rights, franchises, and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate

limits of said City and County of San Francisco, more particularly described as follows to-wit: Commencing at the intersection of Brannan and Second streets; thence along Second street to Townsend street; thence along Townsend street to Third street; also, commencing at the intersection of Bryant and First streets; thence along Bryant street to Spear street; also, commencing at the intersection of Brannan and First streets; thence along Brannan street to Beale street; thence along Beale street to Bryant street; also commencing at the intersection of Fifth street with the northerly line of Channel street; thence along Fifth street to Illinois street; also, commencing at the intersection of Howard and Twenty-sixth streets; thence along the line of Howard street when opened and extended to Army street; thence along Army street, Precita avenue and Colusa street to San Bruno road; also, commencing at the intersection of Montgomery avenue and Pacific street; thence along Montgomery avenue to Union street; also, commencing at the intersection of Powell and Beach streets; thence along Powell street to Jefferson street and the water front; also commencing at the intersection or junction of Market and Third streets; thence along Market street to Fell street; also commencing at the intersection of Fell and Franklin streets; thence along Fell street to Stanyan street; also commencing at the intersection or junction of Stanyan street with the northerly line of Haight street; thence along Stanyan street to Carl street; thence along Carl street to First avenue; thence along First avenue to and upon H street; also commencing on Hugo street at its intersection with First avenue; thence along Hugo street to Seventh avenue; thence along Seventh avenue to and upon H street; also commencing at the intersection of Hugo street and Seventh avenue; thence along Seventh avenue to I street; thence along I street to Fifteenth avenue; thence along Fifteenth avenue to and upon H street; the total length of said last-named railways being, as estimated, eight miles, only a portion of which has been constructed:

And whereas, the said party of the tenth part, The North Beach and Mission Railway Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street to California street; thence along California street to Kearny street; also commencing at the intersection or junction of Market and California streets; thence along Market street to Pine street; thence along Pine street to Battery street; also commencing at the intersection or junction of Market and Pine streets; thence along Market street to First street; also commencing at the intersection of California and Battery streets;

53 thence along Battery street to Bush street; thence in a direct line and across Market street to its intersection or junction with First street; thence along First street to Folsom street; thence along Folsom street to Stoneman street; also commencing at the intersection of Twenty-sixth and Folsom streets; thence along Twenty-sixth street to Bryant avenue; thence along Bryant avenue to Chan-

nel street; thence across Channel street to Bryant street; thence along Bryant street to Second street; thence along Second street to Folsom street; thence along Folsom street to East street; thence along East street to Market street and the city front; also commencing at the junction of Army street and Precita avenue; thence along Army street and Colusa street to Nebraska street and San Bruno avenue; also commencing at the intersection of Fourth and Townsend streets; thence along Fourth street to Market street; thence across Market street to its intersection or junction with Stockton street; thence along Stockton street to Geary street; thence along Geary street to Kearny street; thence along Kearny street to Pacific street; thence along Pacific street to Dupont street; thence along Dupont street to Broadway; thence along Broadway to Powell street; thence along Powell street to Montgomery avenue; thence along Montgomery avenue to Mason street; thence along Mason street to Bay street; also commencing at the intersection of Dupont street and Broadway; thence along Broadway to Montgomery avenue; also commencing at the intersection of Pacific street and Montgomery avenue; thence along Montgomery avenue to Broadway; also commencing at the intersection of Geary and Kearny streets; thence along Kearny street to Market street; thence along Market street to Eighth street; thence along Eighth street to Bryant street; also commencing at the intersection of Fourth and Townsend streets; thence along Townsend street to Third street; the total length of said railways being as estimated fifteen miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the tenth part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection of Montgomery avenue and Broadway; thence along Montgomery avenue to Powell street; also commencing at the intersection of Montgomery avenue and Mason street; thence along Montgomery avenue to Beach street; also commencing at the intersection of Folsom and Steuart streets; thence along Steuart street to Market street; also commencing at the intersection of Fourth and Townsend streets; thence along Fourth street to the southerly end thereof; the total length of said last-named railways being as estimated two miles, only a portion of which has been constructed:

And whereas, the said party of the eleventh part, the Ferries and Cliff House Railway Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit:

54 Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street and curving into Sacramento street; thence along Sacramento street to Walnut street; also commencing on East street at its intersection or junction with Market street; thence along East street to Clay street; thence along Clay street to Larkin street; thence along Larkin street to Sacramento street; also commencing at the intersec-

tion of Jackson and Powell streets; thence along Jackson street to Central avenue; also commencing at the intersection of Stockton and Washington streets; thence along Washington street to Steiner street; thence along Steiner street to Jackson street; also commencing at the intersection or junction of Market and Powell streets; thence along Powell street to Jackson street; also commencing at the intersection of Mason and Clay streets, there connecting with said line above described on Clay street; thence along Mason street to Montgomery avenue; thence along Montgomery avenue to Taylor street; thence along Taylor street to Bay street; thence along Bay street to Powell street; also commencing at the intersection of Stockton and Sacramento streets, there connecting with said line above described on Sacramento street; thence along Stockton street to Washington street; also commencing at the intersection of Jackson street and Central avenue; thence along Central avenue to California street; thence along California street to or near the city cemetery; thence northerly along or near Thirty-second avenue to and across Lake street; thence in a northwesterly, westerly, southwesterly and southerly direction near to and following generally the line of the ocean shore to Forty-eighth avenue; thence along Forty-eighth avenue to the Cliff House road; also commencing at the intersection of California street and Seventh avenue, there connecting with said line above described on California street; thence along Seventh avenue to the north line of Golden Gate Park; the total length of said railways being as estimated sixteen miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the eleventh part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection or junction of Clay and East streets; thence along East street north to Broadway; thence along Broadway to Powell street; thence along Powell street to Vallejo street; thence along Vallejo street to Devisadero street; thence along Devisadero street to Sacramento street; also commencing at the intersection of Sacramento and Walnut streets; thence along Sacramento street to and across First avenue into Lake street; thence along Lake street to Sixth avenue; thence along Sixth avenue to D street; thence along D street to the ocean; also commencing at the intersection or junction of Eddy and Market streets; thence along Eddy street to Devisadero street; also commencing at the intersection of Sacramento and Scott streets; thence along Scott street to Clay street; thence along Clay street to First avenue; thence along First avenue to California street; also commencing at the intersection of Powell and Bay streets; thence
55 along Bay street to the sea-wall; also commencing at the intersection of Clay and Larkin streets; thence along Clay street to Van Ness avenue; the total length of said last-named railways being as estimated eleven miles, only a portion of which has been constructed.

And whereas, said parties, and all of them, now are, and ever

since their organization and incorporation have been, railroad corporations duly and lawfully organized, and existing as such, under the laws of the State of California relating to the formation and existence of railroad corporations.

And whereas, said respective parties believe that a consolidation and amalgamation of their capital stock, their debts, properties, assets franchises, will be mutually advantageous.

And whereas, the respective Boards of Directors of said corporations, parties hereto, have agreed upon the consolidation and amalgamation of said corporations, their capital stocks, debts, properties, assets and franchises in the following manner, to-wit:

First. That the said consolidation and amalgamation shall be made at once, and that the name and style of the consolidated and amalgamated corporation shall be Market Street Railway Company. That it shall continue in existence for a period of fifty years from the date of these articles.

Second. That the several capital stocks, debts, properties, assets and franchises held, owned or possessed by each of said corporations shall be vested in said consolidated and amalgamated corporation, The Market Street Railway Company, as fully as the same are now severally held and enjoyed by them respectively, subject, however, to all the conditions, stipulations, contracts, liens, claims and charges thereon, and to all debts and obligations of said respective corporations; and said consolidated and amalgamated corporation shall fully complete, carry out and perform all valid conditions, stipulations and contracts heretofore made by and shall pay and discharge all liens, claims and charges heretofore created or suffered by any of said corporations on their respective properties and shall pay and discharge all valid debts and obligations of every kind, character and description heretofore incurred or assumed by or now existing against any of said corporations.

Third. That the objects, the purposes, the capital stock, the Board of Directors and the principal place of business shall be as expressed in the articles of consolidation, amalgamation and incorporation hereinafter set forth.

Fourth. That the stockholders of each of said corporations, parties hereto, shall have issued to them the number of shares of the capital stock of the consolidated and amalgamated corporation which the Board of Directors of the corporations, parties hereto, have allotted to such stockholders respectively, upon the surrender of the certificates of stock held by said stockholders in said corporations respectively.

56 And whereas, the holders of more than three-fourths in value of all the capital stock of and issued by each of said respective corporations, parties hereto, have given written consent to the consolidation and amalgamation of said corporations in the manner agreed upon, as aforesaid, by their respective Boards of Directors, and for the purposes expressed in the Articles of Consolidation, Amalgamation and Incorporation following:

Now therefore, know all men by these presents, that the parties hereto, in pursuance of the laws of the State of California, in such

cases made and provided, do hereby consolidate and amalgamate their capital stocks, debts, properties, assets and franchises for the uses and purposes aforesaid, and do hereby vest the same in the said consolidated and amalgamated corporation, the Market Street Railway Company, and in pursuance of said consolidation and amalgamation, and in order to more fully carry the same into force and effect, do hereby adopt the following Articles of Consolidation, Amalgamation and Incorporation:

I.

The name of said consolidated and amalgamated corporation shall be Market Street Railway Company.

II.

The objects and purposes of said consolidated and amalgamated corporation are as follows, to-wit:

To purchase, acquire, construct, lease, hire, rent, own, control, operate and maintain street railroads in, along and upon the streets, alleys, highways, roads or lands, and within the corporate limits of the City and County of San Francisco, State of California, and the County of San Mateo, in said State, and to demise and lease the same, or any part thereof, to persons or corporations.

The kinds of railroads to be purchased, acquired, constructed, leased, hired, rented, owned, controlled, operated and maintained by the said consolidated and amalgamated corporation are double or single track street railroads, with all necessary switches, sidetracks, turnouts, turntables and terminal accommodations, and also with all necessary and convenient connections with power houses and car houses, and with all or any of the tracks now laid or which may be hereafter laid under any and all franchises and privileges which have been heretofore granted to or held by any of the constituent corporations of, or may hereafter be granted to this company, or any other company or person or persons, by the governing authorities of said city and county, or said County of San Mateo, or otherwise, said railroads to be operated by animals or by wire cables and stationary engines or by electricity or by locomotive engines, or by all or any and every of such means, or by such other means as science or discovery or invention may provide and the law sanction.

57 The places from and to which said railroads run and are intended to be run are all within the City and County of San Francisco, in the State of California, and the County of San Mateo, in said State, and are as follows:

II.

First. Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street to Seventeenth street; thence along Castro street to its southerly termi-

nation; also commencing at the intersection of Castro and Twenty-sixth streets; thence along Twenty-sixth street or by the most practicable route to Diamond street; thence along Diamond street to its southerly termination; also commencing at the intersection or junction of Market and Church streets, there connecting with the tracks of this Company on Market street; thence along Church street to and across Thirtieth street to a proposed car house on Dame street; also commencing at the intersection or junction of Market and Valencia streets, there connecting with the tracks of this company on Market street; thence along Valencia street to Mission street.

Second. Commencing at the city front at the intersection or junction of Market and East streets; thence along East Street to Mission street; thence along Mission street and West Mission street and Mission street road and Telegraph or New County road to the southerly boundary line of said city and county; thence to such point in the County of San Mateo, in said State, as the Board of Directors of this corporation may determine upon and the Board of Supervisors or Trustees of said County of San Mateo may authorize; also commencing at the intersection or junction of Mission and Twenty-ninth streets; thence along Twenty-ninth street to Noe; also commencing at the intersection or junction of Mission street and Cortland avenue; thence along Cortland avenue to Butler street; thence along Butler street to Blaine street; thence along Blaine street to North avenue; thence along North Avenue to Cortland avenue; and along California avenue from Cortland avenue to Powell avenue; thence along Powell avenue to Mission street; also along Virginia avenue from California avenue to Mission street; also commencing at the intersection or junction of Mission street and Richland avenue; thence along Richland avenue to Andover avenue; thence along Andover avenue to East Park street; thence along East Park street, Holly Park avenue and West Park street to Holly street, and along Holly street from Mission street to Richland avenue.

Third. Commencing at the city front at the intersection or junction of Mission and East streets, there connecting with the tracks of this company on East street; thence along East street to Howard street; thence along Howard street to Twenty-sixth street; thence along the line of Howard street when opened and extended, to Army street; also commencing at the intersection of Valencia and Army streets; thence along Army street, Precita avenue and Colusa street to the junction of San Bruno road, Nebraska street and Colusa street; thence along Colusa street to its easterly termination.

58 Fourth. Commencing at the city front at the intersection or junction of Howard and East streets, there connecting with the tracks of this company on East street; thence along East street to Folsom street; thence along Folsom street to Stoneman street; also commencing at the intersection or junction of Market and Steuart streets; thence along Steuart street to Folsom street.

Fifth. Commencing at the intersection or junction of Market and Spear streets; thence along Spear street to Bryant street; thence along Bryant street and across Channel street to Bryant avenue; thence along Bryant avenue to Precita avenue.

Sixth. Commencing at the intersection of Beale and Bryant streets, there connecting with the tracks of this company on Bryant street; thence along Beale street to Brannan street; thence along Brannan street to Channel street; thence along Channel street to Potrero avenue; thence along Potrero avenue to Precita avenue; also commencing at the intersection of Potrero avenue and Yolo street; thence along Yolo street to Nebraska street; also commencing at the intersection or junction of Nebraska and Twenty-fourth streets; thence along Nebraska street to San Bruno road; thence along San Bruno road to its southerly termination; also commencing at the intersection or junction of San Bruno road with Teneriffe street or Fifteenth avenue; thence along Teneriffe street or Fifteenth avenue to its southeasterly termination; also commencing at the intersection or junction of Nebraska and Twenty-fourth streets; thence along Twenty-fourth street to Ellen street; also commencing at the intersection of Twenty-fourth and Noe streets; thence along Noe street to Jersey street; thence curving into and along Jersey street to the car house of this company on Jersey street between Noe and Castro streets; also commencing at the intersection or junction of Potrero avenue and Twenty-third street; thence along Twenty-third street to Church street; also commencing at the intersection of Potrero avenue and Twenty-second street; thence along Twenty-second street to Chattanooga street; thence along Chattanooga street to Twenty-fourth street; also commencing at the intersection of Dolores and Twenty-second streets; thence along Dolores street to Twenty-fourth street; also commencing at the intersection or junction of Potrero avenue and Twenty-sixth street; thence along Twenty-sixth street to Bellevue street.

Seventh. Commencing at the intersection of California and Battery streets, there connecting with the tracks of this company on California street; thence along Battery street to Bush street; thence in a direct line and across Market street to its intersection or junction with First street; thence along First street to Brannan street, and connecting with the tracks of this company on Folsom street.

Eighth. Commencing at the intersection of Jackson and Sansome streets; thence along Sansome street to Market street; thence along Market street to Second street; thence along Second street to Townsend street; thence along Townsend street to Fourth street.

59 Ninth. Commencing at the intersection of Jackson and Montgomery streets; thence along Montgomery street to Market street; thence along Market street to Third street; thence along Third street to Berry street; thence along Berry street to Fifth street; also commencing at the intersection of Third and Tehama streets; thence along Tehama street to Fourth street.

Tenth. Commencing at the intersection or junction of Kentucky and Fourth streets; thence along Fourth street to Market street; thence across Market street to its intersection or junction with Stockton street; thence along Stockton street to Union street.

Eleventh. Commencing at the intersection or junction of Market and Fifth streets, there connecting with the tracks of this company on Market street; thence along Fifth street to Kentucky street.

Twelfth. Commencing at the intersection of Post and Taylor streets; thence along Taylor street to Market street; thence across Market street to Sixth street; thence along Sixth street to the southerly termination of Sixth street.

Thirteenth. Commencing at the intersection or junction of Sixth and Bluxome streets; thence along Bluxome street to the east line of Fourth street; thence through private property to Townsend street, there connecting with the tracks of this company on Townsend street.

Fourteenth. Commencing at the intersection or junction of Market and Seventh streets, there connecting with the tracks of this company on Market street; thence along Seventh street to King street.

Fifteenth. Commencing at the intersection or junction of Market and Eighth streets, there connecting with the tracks of this company on Market street; thence along Eighth street to and across Townsend and Channel streets to Kansas street, connecting with the tracks of this company on Brannan street at its intersection with Eighth street; and from the intersection or junction of Channel and Kansas streets, along Kansas street to Santa Clara street; thence along Santa Clara street to Connecticut street; thence along Connecticut street to Solano street; thence along Solano street to Kentucky street; also commencing at the intersection or junction of Kentucky and Fourth streets; thence along Kentucky street to and across Tulare street, Islais Creek channel, and Islais street to Railroad avenue; thence along Railroad avenue, and by the most practicable route to the southerly boundary line of said city and county; also commencing at the intersection of Napa and Kentucky streets, there connecting with the tracks of this company on Kentucky street; thence along Napa street to Maryland street.

Sixteenth. Commencing at the intersection or junction of Potrero avenue with Channel and Brannan streets; thence along Channel street to Tenth street; thence along Tenth street to Market street; thence across Market street to the intersection or junction of
60 Market, Fell and Polk streets; thence along Fell street to Stanyan street; thence along Stanyan street to Fulton street, there connecting with the tracks of this company on Fulton street; also commencing at the intersection of Fell and Franklin streets; thence along Franklin street to Oak street; also commencing at the intersection or junction of Market, Fell and Polk streets, there connecting with the tracks of this company on Fell street; thence along Market street to Kearny street; thence along Kearny street to Montgomery avenue.

Seventeenth. Commencing at the intersection or junction of Illinois and Sixteenth streets; thence along Sixteenth street to Market street; thence along Market street to Seventeenth street; thence along Seventeenth street to Ashbury street; thence along Ashbury street to its junction with Clayton street, or the southerly extensions thereof; thence along such southerly extension of Clayton street and Clayton street to the northerly line of San Miguel Rancho; thence continuing northerly either along Clayton street or through and across private property to Carl street; thence across Carl street and

through and across private property to the intersection of Cole street with Frederick street.

Eighteenth. Commencing at the intersection or junction of Market and Haight streets, there connecting with the tracks of this company on Market street; thence along Haight street to Golden Gate Park.

Nineteenth. Commencing at the intersection of Mission and Fourteenth streets, there connecting with the tracks of this company on Mission street; thence along Mission and West Mission streets to Potter street; thence along Potter street to Market street; thence across Market street to Page street; thence along Page street to Stanyan street; also commencing on West Mission street at a point where the line of Mission street projected northerly would intersect said street; thence northerly across Brady and Market streets to Page street.

Twentieth. Commencing at the intersection or junction of Market and Oak streets, there connecting with the tracks of this company on Market street; thence along Oak street to Stanyan street; thence along Stanyan street to Carl street; thence along Carl street to First avenue; thence along First avenue to and upon H street; also commencing at the intersection or junction of Hugo street and First avenue; thence along Hugo street to Seventh avenue; also commencing at the intersection or junction of Carl street and First avenue; thence along First avenue to I street; thence along I street to Fifteenth avenue; thence along Fifteenth avenue to and upon H street; also commencing at the intersection of Seventh avenue and I street; thence along Seventh avenue to and upon H street.

Twenty-first. Commencing at a point on Stanyan street between Waller and Frederick streets; thence curving to the right across Golden Gate Park and Willard street, and through private property and across First avenue to H street; thence westerly along H
61 street to the vicinity of the Great Highway; thence curving northerly and deflecting easterly and across Golden Gate Park to the intersection of D street and Forty-ninth avenue; thence along Forty-ninth avenue to B street; also curving into Waller street from Stanyan street; thence along Waller street to Shrader street.

Twenty-second. Commencing at the intersection of Oak street and Masonic avenue; thence along Masonic avenue to Frederick street; thence along Frederick street to the westerly line of First avenue, and connecting with the tracks of this company on Page street at its intersection with Masonic avenue.

Twenty-third. Commencing at the intersection or junction of Market and Hayes streets, there connecting with the tracks of this company on Market street; thence along Hayes street to Stanyan street.

Twenty-fourth. Commencing at the intersection or junction of Market and McAllister streets, there connecting with the tracks of this company on Market street; thence along McAllister street to Lott street; thence southwest to Fulton street; thence along Fulton street and D street to the Great Highway.

Twenty-fifth. Commencing at the intersection or junction of

Market and Turk streets, there connecting with the tracks of this company on Market street; thence along Turk street to and upon and across First avenue to B street; thence along B street to Nineteenth avenue; thence along Nineteenth avenue to, upon and across D street to Golden Gate Park; also commencing at the intersection of Turk and Baker streets; thence along Baker street to Fell street.

Twenty-sixth. Commencing at the intersection or junction of Market and Eddy streets, there connecting with the tracks of this company on Market street; thence along Eddy street to its westerly termination.

Twenty-seventh. Commencing at the intersection or junction of Market and Ellis streets, there connecting with the tracks of this company on Market street; thence along Ellis street to Broderick street; thence along Broderick street to Haight street.

Twenty-eighth. Commencing at the intersection or junction of Market and Geary streets, there connecting with the tracks of this company on Market street; thence along Geary street to its junction with Point Lobos avenue; thence along Point Lobos avenue to its junction with the road known as Point Lobos road, or Cliff House road; thence along said last-named road to the westerly end thereof; also commencing at the intersection of Fifth and Point Lobos avenues; thence along Fifth avenue to Golden Gate Park.

Twenty-ninth. Commencing at the junction of Market, Post and Montgomery streets, there connecting with the tracks of this company on Market street; thence along Post street to Central avenue.

Thirtieth. Commencing at the intersection or junction of Market and Sutter streets, there connecting with the tracks of this
62 company on Market street; thence along Sutter street to Grant avenue; also commencing at the intersection or junction of Market and Bush streets, there connecting with the tracks of this company on Market street; thence along Bush street to Grant avenue; also commencing at the intersection of Bush street and Grant avenue; thence along Grant avenue to Market street; also commencing at the intersection or junction of Market and Pine streets, there connecting with the tracks of this company on Market street; thence along Pine street to Kearny street; also commencing at the intersection or junction of Market and California streets, there connecting with the tracks of this company on Market street; thence along California street to and upon Kearny street.

Thirty-first. Commencing at the intersection of Market and Sacramento streets, there connecting with the tracks of this company on Market street; thence along Sacramento street to and upon and across First avenue to Lake street; thence along Lake street to Sixth avenue; thence along Sixth avenue to Golden Gate Park; also commencing at the intersection or junction of Sixth avenue and Lake street; thence along Lake street to Seventh avenue; thence along Seventh avenue to Golden Gate Park.

Thirty-second. Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Clay street; thence along Clay street to First avenue; also commencing at the intersection of Clay and Larkin streets; thence along

Larkin street to Sacramento street; also commencing at the intersection of Clay and Scott streets; thence along Scott street to Sacramento street.

Thirty-third. Commencing at the intersection or junction of East and Clay streets, there connecting with the tracks of this company on East street; thence along East street to Washington street; thence along Washington street to Steiner street; thence along Steiner street to Jackson street.

Thirty-fourth. Commencing at the intersection or junction of East and Washington streets, there connecting with the tracks of this company on East street; thence along East street to Jackson street; thence along Jackson street to First avenue; thence along First avenue to Golden Gate Park; also commencing at the intersection of Jackson street and Central avenue, there connecting with the tracks of this company on Jackson street; thence along Central avenue to California street; thence along California street to or near the city cemetery; thence northerly along or near Thirty-second avenue to and across Lake street; thence in a northwesterly, westerly, southwesterly and southerly direction near to and following generally the line of the ocean shore to Forty-eighth avenue; thence along Forty-eighth avenue to the Cliff House road.

Thirty-fifth. Commencing at the intersection or junction of East and Jackson streets, there connecting with the tracks of this company on East street; thence along East street to Pacific street; thence along Pacific street to Mason street; also commencing at the intersection or junction of East and Pacific streets, there connecting with the tracks of this company on East street; thence along
63 East street to Broadway; thence along Broadway to Mason street; also commencing at the intersection of Montgomery avenue and Vallejo street; thence along Vallejo to Devisadero street.

Thirty-sixth. Commencing at the intersection of Washington street and Montgomery avenue; thence along Montgomery avenue to Beach street; also commencing at the intersection of Taylor street and Montgomery avenue; thence along Taylor street to Bay street; thence along Bay street to East street and the water front; also commencing at the intersection of Dupont and Pacific streets; thence along Dupont street to Broadway.

Thirty-seventh. Commencing at the intersection or junction of Market and Powell streets, there connecting with the tracks of this company on Market Sreet; thence along Powell street to Jefferson street; also commencing at the intersection of Powell and Union streets; thence along Union street to Stockton street; also commencing at the intersection of Sacramento and Mason streets; thence along Mason street to Jefferson street; thence along Jefferson street to Powell street.

Thirty-eighth. Commencing at the intersection of Post and Leavenworth streets; thence along Leavenworth street to Park avenue; thence along Park avenue to Grove street; thence along Grove street to Polk street; thence along Polk street to and upon Market street, there connecting with the tracks of this company from Fell street across Market street to Tenth street.

Thirty-ninth. Commencing at the intersection or junction of Market and Church streets, there connecting with the tracks of this company on Market street, and with those on Church street on the southerly side of Market street; thence across Market street and along Church street to its intersection with Hermann or Kate street; thence westerly along Hermann or Kate street to its intersection with Fillmore street; also commencing at the intersection of Church and Ridley streets; thence along Ridley street to its intersection with Fillmore street; thence along Fillmore street to the northerly end thereof.

Fortieth. Commencing at the intersection or junction of Market, Castro and Seventeenth streets, there connecting with the tracks of this company on Market street and with those on Castro street on the southerly side of Market street; thence across Market street and along Castro street to Ridley street; thence along Ridley street to Devisadero street; thence along Devisadero street to the northerly end thereof; also curving from Devisadero street into and along O'Farrell street to a proposed car house on O'Farrell street, between Devisadero and Scott streets.

The total length of said roads, as estimated, is one hundred and seventy-five miles or thereabouts.

Forty-first. Also along and upon other parts of the same or any other streets, alleys, highways, roads or lands in said City and County of San Francisco and said County of San Mateo.

64 To acquire, hold and own all rights, franchises and privileges which have been heretofore or may hereafter be granted in respect to said railroads or any part thereof.

To buy, lease, let, own, sell, mortgage and deal in real estate, and to improve the same.

To produce and sell motive power and illuminating light of every description, manufacture and sell wire cables, construct and sell cars and other railway equipment and appliances.

To buy, barter for, sell, exchange, hypothecate and deal in the shares or capital stock of other street railroad corporations or corporations of any kind.

To buy, sell and deal in letters-patent rights and inventions appertaining to the construction, operation and business of street railroads.

To carry on, conduct and engage in any business transaction or matter which may or can be included or appertain to any of the purposes aforesaid.

III.

The place where the principal place of business of said corporation is to be transacted is the City and County of San Francisco, State of California.

IV.

The term for which said corporation is to exist is fifty years from the date hereof.

V.

The number of directors of said corporation is to be nine, and the names and residences of those appointed for the first year are as follows:

Names.	Residence.
Charles F. Crocker	San Francisco, Cal.
H. E. Huntington	San Francisco, Cal.
Charles G. Lathrop	San Francisco, Cal.
A. Hayward	San Mateo, Cal.
M. D. Stein	San Francisco, Cal.
W. J. Adams	San Mateo County, Cal.
N. T. Smith	San Mateo County, Cal.
J. L. Willcutt	Oakland, Cal.
F. S. Douty	San Francisco, Cal.

VI.

The capital stock of said corporation is to be eighteen million seven hundred and fifty thousand dollars ($18,750,000.00), divided into one hundred and eighty-seven thousand five hundred (187,500) shares of the par value of one hundred dollars each.

VII.

The amount of capital stock which was actually subscribed in each of said corporations, parties hereto, at the time of their formation, and the names of the persons by whom the same was subscribed,
65 and the number of shares subscribed by and then held by each, was as set forth in the original articles of incorporation of the several companies, now consolidated and amalgamated, and the same was, and now is, more than one thousand dollars per mile of the estimated length of the several railroads mentioned and described in the said respective articles of incorporation.

VIII.

That of the capital stock of each of said corporations there had at the time of their formation (where the same was required by law) been actually paid to the respective treasurers thereof the amounts specified in their original articles of incorporation verified by the affidavits filed in the office of secretary of State of the State of California, and the amounts so paid in, were in each case ten per cent of the subscribed capital stock.

IX.

The amount of the capital stock of the said corporations which has been subscribed and actually paid in exceeds the amount of one thousand dollars per mile of the entire length of the said railroads as estimated and as stated and set forth in Article II hereof.

In witness whereof, the said parties have caused these presents to be signed by their respective Presidents or Vice-Presidents and Secretaries, and their corporate seals to be hereunto affixed, pursuant to resolutions of their respective Boards of Directors, this 13th day of October, 1893.

MARKET STREET CABLE RAILWAY COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

MARKET STREET AND FAIRMOUNT RAILWAY COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

CITY RAILROAD COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

POTRERO AND BAY VIEW RAILROAD COMPANY,

[CORPORATE SEAL.] By H. E. HUNTINGTON, *President.*
J. L. WILLCUTT, *Secretary.*

SOUTHERN HEIGHTS AND VISITACION RAILWAY COMPANY,

[CORPORATE SEAL.] By H. E. HUNTINGTON, *President.*
J. L. WILLCUTT, *Secretary.*

PARK AND OCEAN RAILROAD COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

OCEAN BEACH RAILWAY COMPANY,

[CORPORATE SEAL.] By H. E. HUNTINGTON, *President.*
J. L. WILLCUTT, *Secretary.*

CENTRAL RAILROAD COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

THE OMNIBUS CABLE COMPANY,

[CORPORATE SEAL.] By M. D. STEIN, *President.*
TH. KRAUSS, *Secretary.*

THE NORTH BEACH AND MISSION RAILWAY COMPANY,

[CORPORATE SEAL.] By M. D. STEIN, *President.*
H. W. HATHORNE, *Secretary.*

FERRIES AND CLIFF HOUSE RAILWAY COMPANY,

[CORPORATE SEAL.] By W. J. ADAMS, *President.*
GEO. H. WAGGONER, *Secretary.*

66 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Market Street Cable Railway Company, one of the corporations described in and who executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Market Street and Fairmount Railway Company, one of the corporations described in and who exe- *Company, one of the corporations described in and who exe* cuted the within and *cuted the within and* annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Park and Ocean Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

67 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared H. E. Huntington, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Ocean Beach Railway Company, one of the corporations described in and who executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared H. E. Huntington, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Potrero and Bay View Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco,

duly commissioned and sworn, personally appeared H. E. Huntington, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Southern Heights and Visitacion Railway Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

68 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the City Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Central Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared M. D. Stein, known to me to be the president, and Theodore Krauss, known to me to be the Secretary of The Omnibus Cable Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

69 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared M. D. Stein, known to me to be the President, and H. W. Hathorne, known to me to be the Secretary of The North Beach and Mission Railway Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared W. J. Adams, known to me to be the President, and G. H. Waggoner, known to me to be the Secretary of the Ferries and Cliff House Railway Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Market Street Cable Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferries and Cliff
70 House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this fifth day of September, A. D. 1893.

C. P. HUNTINGTON.
A. D. HUNTINGTON.
STILLMAN & HUBBARD.
CHAS. F. CROCKER.
HARRIET V. ALEXANDER.
H. E. HUNTINGTON.
CHAS. G. LATHROP.
WM. H. CROCKER.
W. E. BROWN.
C. E. GREEN.
GEORGE CROCKER.
CHAS. F. CROCKER, *Trustee.*
WM. H. CROCKER, *Trustee.*
N. T. SMITH.
J. L. WILLCUTT.
A. N. TOWNE.
WM. H. MILLS.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Market Street and Fairmount Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mis-

sion Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
H. E. HUNTINGTON.
N. T. SMITH.
CHAS. F. CROCKER.
C. E. GREEN.
W. V. HUNTINGTON.
J. L. WILLCUTT.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the City Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and
71 Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
CHAS. F. CROCKER.
H. E. HUNTINGTON.
N. T. SMITH.
F. S. DOUTY.
GEORGE CROCKER.
W. V. HUNTINGTON.
J. L. WILLCUTT.
C. E. GREEN.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Potrero and Bay View Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of the said companies with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Southern Heights and

Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this fifth day of September, A. D. 1893.

[SEAL.]

C. P. HUNTINGTON.
STILLMAN & HUBBARD.
CHAS. F. CROCKER.
CROCKER ESTATE CO.,
By GEORGE CROCKER,
Vice-President.
N. T. SMITH.
C. E. GREEN.
H. E. HUNTINGTON.
J. L. WILLCUTT.

72 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Southern Heights and Visitacion Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, City Railroad Company, Central Railroad Company, The Omnibus Cable Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this nineteenth day of September, A. D. 1893.

[SEAL.]

H. E. HUNTINGTON.
CHAS. F. CROCKER.
J. L. WILLCUTT.
N. T. SMITH.
F. S. DOUTY.
C. E. GREEN.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Park and Ocean Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company,

Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferris and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
H. E. HUNTINGTON.
N. T. SMITH.
W. E. BROWN.
GEORGE CROCKER.
J. L. WILLCUTT.
CHAS. F. CROCKER.

73 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Ocean Beach Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The Omnibus Cable Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
H. E. HUNTINGTON.
N. T. SMITH.
CHAS. F. CROCKER.
J. L. WILLCUTT.
F. S. DOUTY.
GEORGE CROCKER.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Central Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of the said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, the Omnibus Cable Company, The North Beach and Mission Railway Company, and the Ferries and Cliff

House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
CHAS. F. CROCKER.
H. E. HUNTINGTON.
N. T. SMITH.
J. L. WILLCUTT.
W. E. BROWN.
S. T. GAGE.
F. S. DOUTY.
GEORGE CROCKER.
A. J. GUNNISON.

74 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this twenty-first day of September, A. D. 1893.

A. HAYWARD.
SUTRO & CO.
GUSTAV SUTRO.
EUGENE LE ROY.
GEORGES LE ROY,
By EUGENE LE ROY, *His Attorney in Fact.*
HOWARD HAVENS.
TH. KRAUSS, *Trustee.*
E. HULL.
M. D. STEIN.
M. D. STEIN,
M. EHRMAN,
(Executors of the Last Will and Testament of Daniel Stein, Deceased.)
J. A. DONOHOE, JR., *Trustee.*
PHIL. BARTH, *Trustee.*
SUTRO & CO., *Trustee.*
JAMES GILLON, *Trustee.*
P. B. PETTIGREW, *Trustee.*
JAMES ROLPH, *Trustee.*
F. REICHLING,
By L. F. REICHLING.
JOHN McKEE, *Trustee.*
PHIL. BARTH, *Trustee.*
DOLLIVER & BRO.
EDWARD BARRY.
J. H. JELLETT, *Trustee.*
JONAS SCHOENFELD, *Trustee.*
JOHN W. LYNCH.
AMELIA H. McALLISTER.
By M. HALL McALLISTER, *Atty. in Fact.*
O. H. SMITH.
W. H. RICHTER.
I. S. BELCHER.
E. RENIER.
A. L. PRINGLE.
WM. WATSON.
H. H. GRAY.
MALACHY WHELAN.
KATE JOHNSON,
B. BANGS, *Agent.*
ANT. MICHALITSCHKE.
ELIZA BAUM.
GEORGES LE ROY.
EDWARD E. KENTFIELD.
JAMES DUNN.
B. P. OLIVER,
By J. COSTA, *His Attorney in Fact.*
MARY A. TOBIN,
By ALFRED TOBIN, *Her Attorney in Fact.*
WM. H. JORDAN.
MARY L. TREANOR,
By WM. H. JORDAN, *Her Attorney.*
WM. GRUENHAGEN.

75 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Board of Directors of said companies.

Done this second day of October, A. D. 1893.

ROWE & ROSENBERG.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this third day of October, A. D. 1893.

THOS. EMERY'S SONS.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this fifth day of October, A. D. 1893.

H. MATTHEWS.

76 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The North

Beach and Mission Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Rail-Road Company, The Omnibus Cable Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this twenty-first day of September, A. D. 1893.

[SEAL.]

A. HAYWARD.
GUSTAV SUTRO.
EUGENE LE ROY.
EUGENE LE ROY, *Trustee.*
M. D. STEIN.
ED. KAUFMANN.
W. S. WOOD.
R. H. LLOYD.
DANIEL MEYER, *Trustee.*
ALBERT MEYER.
ALBERT MEYER, *Trustee.*
H. E. HUNTINGTON.
PACIFIC IMPROVEMENT CO.,
By H. E. HUNTINGTON, *President,*
By F. S. DOUTY, *Secretary.*
F. S. DOUTY.
CHAS. F. CROCKER.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Ferries and Cliff House Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The Omnibus Cable Company, and the North Beach
77 and Mission Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this thirtieth day of September, A. D. 1893.

[SEAL.]

W. H. MARTIN.
H. H. LYNCH.
W. J. ADAMS.
JOHN BALLARD.
THOMAS MAGEE.
I. STRASSBURGER.
G. H. WAGGONER, *Tr.*
ROGER D. MAGEE.
WM. A. MAGEE.
H. H. LYNCH, *Trustee.*
I. STRASSBURGER, *Trustee.*

(Endorsed:) Filed in the office of the County Clerk of the City and County of San Francisco, State of California, the 13th day of October, A. D. 1893. M. C. Haley, County Clerk, by J. J. Lynch, Deputy County Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, M. C. Haley, County Clerk of the City and County of San Francisco, State of California, hereby certify the foregoing to be a full, true and correct copy of the original Articles of Consolidation, Amalgamation and Incorporation of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, City Railroad Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Central Railroad Company, The Omnibus Cable Company, The North Beach and Mission Railway Company, and Ferries and Cliff House Railway Company, filed in my office on the 13th day of October, A. D. 1893.

Attest my hand and my official seal this 13th day of October, A. D. 1893.

[SEAL.]

M. C. HALEY,
County Clerk,
By J. J. LYNCH,
Deputy County Clerk.

(Endorsed:) Filed in the office of the Secretary of State the fourteenth day of October, A. D. 1893. E. G. Waite, Secretary of State, by W. H. Stevens, Deputy. Record Book, —; Page —.

78 EXHIBIT D.

Order No. 2858.

Granting to the Market-Street Railway Company, Its Successors and Assigns, Certain Rights and Privileges Herein Specified.

Whereas, the right, privilege and franchise heretofore applied for by the Market-Street Railway Company and hereinafter set forth and

described, have been submitted to public competition by the publication thereof in the San Francisco Daily Report, a daily newspaper of general circulation printed and published in the city and county of San Francisco, for ten successive days from and after the publication of the notice submitting the same; and whereas, twenty days have elapsed from and after the last day of publication of the said notice; and whereas, the Market-Street Railway Company, a corporation, has filed a bid or offer with this board in the sum of $605 for the right, privilege and franchise hereinafter set forth and described, the said petitioners being the best and only bidder therefor, which bid has been accepted; now, therefore,

The People of the City and County of San Francisco do ordain as follows:

Section 1. The right is hereby granted to the Market-Street Railway Company, its successors and assigns, to construct, lay down, maintain and operate for the unexpired terms of the respective franchises heretofore granted on the street, between which the connections are to be made, as an extension of and adjunct to and in connection with street railroads now owned or operated by the Market-Street Railway Company, or for the construction of which it holds franchises, a single or double-track street railroad, with all necessary and convenient stations, sidetracks, switches, turn-outs, turntables and appliances along and upon the following streets in the city and county of San Francisco, to-wit:

79 From a connection with the line of the Market-Street Railway Company on Sixteenth street at or near its intersection with Church street; thence along and upon Church street to Ridley street and thence along and upon Ridley street to Fillmore street, to a connection with the line of the Market-Street Railway Company on Fillmore street at or near its intersection with Ridley street.

Section 2. The foregoing grant is made upon the following conditions, to be strictly complied with by the said grantee, its successors and assigns:

First. To construct the tracks of said railroads on those portions of the streets above designated as nearly as possible in the middle thereof.

Second. To plant, pave or macadamize the entire length of the streets to be used by their tracks between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street and with good crossings.

Third. The tracks must not be more than five feet wide between the rails and must have a space between them sufficient to allow the cars to pass each other freely.

Fourth. Work to construct said railroads must be commenced within one year from the date of the passage of this ordinance, and the same must be completed within three years thereafter.

Section 3. It shall be lawful for said grantee, its successors and assigns, at its or their option, to propel cars over said railroads or any thereof, by electricity with modern appliances and requirements, or

by wire ropes running under said streets and moved by stationary steam engines, or by such other means as may be sanctioned by law.

Whenever said grantee, its successors or assigns, shall elect to operate said railroads or any thereof, by the use of an endless wire rope or cable and stationary steam engines, it shall be lawful for said grantee, its successors or assigns, to make all needful and convenient trenches and excavations in any of said streets under which they propose to place such rope or cable, and to place in such trenches
80 and excavations all needful and convenient machinery for operating said railroad in the manner and by the means aforesaid. It shall also be lawful for said grantee, its successors and assigns, to erect and maintain at convenient and suitable points along the line of the streets under which such wire ropes or cables are placed steam engines and boilers of ample and sufficient power, and to connect the same with said wire ropes or cables. All such trenches and excavations shall be beneath the surface of the street, which surface shall be securely supported, so as not to impair the use and enjoyment of the streets by the public; the framework of all trenches and excavations in which wire ropes or cables are placed shall be constructed in a substantial and workmanlike manner, and the slot or aperture opening into said trenches or excavations shall not exceed seven-eighths of an inch in width.

Section 4. Whenever it shall be necessary for said grantee, its successors or assigns, to pave or macadamize said railroad tracks or any thereof, as hereinbefore provided, the same material therefor shall be used as is or may be used by said city and county in respect to the remainder of the street, unless otherwise ordered or directed by the Board of Supervisors of said city and county.

Whenever any street or part of a street over which this franchise is granted shall be ordered improved or reimproved and the work of improving or reimproving such street shall be let by contract by the Board of Supervisors or other governing body of this city and county, the portion of said street occupied or to be occupied by the track or tracks of the grantee or grantees of this franchise, between the rails, between the tracks and for two feet on either side of the tracks laid or to be laid, shall be let together with the rest of the street or streets,
and the grantees, their successors or assigns shall be held liable
81 from and after the passage and approval of this order for the payment of the cost of said improvement or improvements, which cost shall be assessed in the proper proportion for the work done between the rails, between the tracks, if there be more than one track, and for two feet on either side of the track or tracks, to the work done upon the entire width of the street or streets so improved or reimproved, and said cost shall be collected in the manner provided for the collection of other street assessments, and shall become a lien upon the roadbed, rolling stock and franchise of said road.

Section 5. The rights hereinbefore granted are upon the express condition that said grantee, its successors and assigns, shall at all times during the continuance of the franchise aforesaid permit and allow mail carriers in the employ of the United States Government, at all times while engaged in the actual discharge of their duty, to

ride on the cars of the railroads hereinbefore described without paying any sum of money whatever for fare or otherwise, and that the franchises hereby granted shall not be operative or effectual until said grantee shall have filed its written promise and undertaking as hereinafter provided.

Section 6. Said grantees are required to file in the office of the Clerk of the Board of Supervisors of this city and county an acceptance in writing of the provisions of this order, and a promise and undertaking to permit mail carriers to ride on its said cars, as in the last preceding section of this order provided, and thereupon the provisions of this order shall be deemed and taken to be a contract between said grantee, its successors and assigns, and said city and county. Unless said acceptance, promise and undertaking be filed within twenty days after the passage or approval of this order, this order shall become, be and remain null, void and of no effect.

82 Section 7. This order shall take effect from and after the date of its passage.

And the Clerk is hereby directed to advertise this order as required by law.

In Board of Supervisors.

San Francisco, April 15, 1895.

Adopted by the following vote:

Ayes: Supervisors King, Scully, Benjamin, Hirsch, Hughes, Dunker, Morgenstern, Wagner.

Noes: Supervisors Dimond, Taylor, Spreckles, Hobbs.

JNO. A. RUSSELL, *Clerk.*

83 EXHIBIT "E."

Bill No. 3410, Ordinance No. 3110 (New Series).

Directing the Board of Public Works to prepare plans, specifications and contracts and advertise for bids for furnishing, delivering the necessary materials therefor, and constructing the Church Street extension of the Municipal Railway System, for which funds were provided in the bond issue authorized August 26, 1913, and approving the plan for overcoming the grades between Eighteenth and Twenty-second streets by diversion through Mission Park and private property between Twentieth and Twenty-second streets.

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The Board of Public Works is hereby authorized, instructed and empowered to immediately prepare plans, specifications and contracts, and advertise for bids for furnishing the additional materials necessary, and constructing an extension to the Municipal Railway System, for which funds were provided in the bond issue authorized August 26, 1913, which extension is more specifically described as follows:

Connecting with the tracks of the Van Ness avenue street railway at Market street, thence along Market street to Church street, thence along Church street to Eighteenth street, thence by a diversion through the westerly side of Mission Park to Twentieth street and Church street, thence across a right of way to be acquired through private property between Twentieth and Twenty-second streets to Twenty-second and Church streets, thence along Church street to Thirteenth street.

Section 2. The plan submitted by the City Engineer through the Board of Public Works for overcoming the steep grades on Church street between Eighteenth and Twenty-second streets by means of a diversion through Mission Park and private property between Twentieth and Twenty-second streets, which plan is on file in
84 the office of the Board of Supervisors, is hereby approved.

Section 3. The Board of Public Works is hereby authorized and permitted to incorporate in the contracts for said extension to the Municipal Railway System provisions to the effect that progressive payments shall be made as provided by Section 21, Article IV, Chapter 1, of the Charter.

Section 4. This Ordinance shall take effect immediately.

Finally Passed—Board of Supervisors, San Francisco, Feb. 8, 1915.

Ayes: Supervisors Bancroft, Gallagher, Hilmer, Hocks, Jennings, Kortick, McLeran, Murdock, Payot, Suhr, Vogelsang.

Noes: Supervisors Deasy, McCarthy, Nelson, Nolan, Power and Walsh.

Absent: Supervisor Hayden.

J. S. DUNNIGAN, *Clerk.*

Approved, San Francisco, Feb. 17, 1915.

JAMES ROLPH, Jr., *Mayor.*

85 EXHIBIT F.

Resolution 12887 (New Series).

Resolved, that the Board of Public Works be directed to proceed without delay to complete the Church Street Railway from Church and Sixteenth streets to Market street and thence along Market street to Van Ness avenue, there connecting with the tracks of the Municipal Railway on Van Ness avenue, according to the provisions of Ordinance No. 3110 (New Series), such construction to consist of double tracks laid outside of the rails of the United Railways and such overhead electrical construction and appurtenances as may be necessary.

Adopted—Board of Supervisors, San Francisco, May 1, 1916.

Ayes: Supervisors Brandon, Deasy, Gallagher, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLeran, Mulvihill, Nolan, Nelson, Power, Suhr, Walsh, Welch, Wolfe.

Approved, San Francisco, May 1, 1916.

J. S. DUNNIGAN, *Clerk.*

JAMES ROLPH, Jr., *Mayor.*

86 EXHIBIT G.

Bill No. 4059, Ordinance No. 3736 (New Series).

Ordering and providing for the construction of an extension of the Municipal Railway system along Market Street from the easterly portal of the Twin Peaks Tunnel to Church Street and from Van Ness Avenue to the existing Municipal Railway tracks in Market Street at Kearney Street.

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The Board of Public Works is hereby directed to prepare plans and specifications for the construction of an extension of the Municipal Street Railway system to consist of double tracks, crossovers, switches, etc., and the necessary overhead electrical appurtenances from the easterly portal of the Twin Peaks Tunnel along Market Street to Church Street connecting with the tracks of the Municipal Railway proposed to be laid in Market Street from Church Street to Van Ness Avenue, connecting with the tracks of the Municipal Railway in Van Ness Avenue, thence along Market Street and connecting with the tracks of the Municipal Railway in Market Street near Kearny Street.

Section 2. Upon the completion of said plans and specifications the said Board of Public Works shall transmit the same to the Board of Supervisors together with requests for such appropriations and additional authority as may be required for the speedy construction of railway extension herein provided for.

Section 3. This ordinance shall take effect immediately.

Finally Passed—Board of Supervisors, San Francisco, May 15, 1916.

Ayes: Supervisors Brandon, Deasy, Gallagher, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLeran, Mulvihill, Nelson, Nolan, Power, Suhr, Walsh, Welch, Wolfe.

J. S. DUNNIGAN, *Clerk.*

Approved, San Francisco, May 16, 1916.

JAMES ROLPH, JR., *Mayor.*

87 Endorsed: Filed Jun. 12, 1916. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

88 (*Subpœna ad Respondendum.*)

UNITED STATES OF AMERICA:

District Court of the United States, Northern District of California, Second Division.

In Equity.

To City and County of San Francisco, a Municipal Corporation; James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and ex-officio President of the Board of Supervisors thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation; Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation:

You are hereby commanded, That you be and appear in said District Court of the United States, Second Division, aforesaid, at the Court Room in San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by United Railroads of San Francisco, a corporation organized and existing under and by virtue of the laws of the State of Cali-
89 fornia, and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable William C. Van Fleet, Judge of said District Court, this 12th day of June in the year of our Lord one thousand nine hundred and Sixteen and of our Independence the 140th.

[SEAL.] WALTER B. MALING, *Clerk,*
By J. A. SCHAERTZER,
Deputy Clerk.

Memorandum Pursuant to Rule 12, *Rules of Practice for the Courts of Equity of the United States.*

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the

day thereof, of this subpœna, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken pro confesso.

WALTER B. MALING, *Clerk,*
By J. A. SCHAERTZER,
Deputy Clerk.

90 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpœna In Equity on the therein-named Adolph Judell as an Individual — as a Member of and constituting the Board of Public Works of the City and County of San Francisco, a Municipal corporation by handing to and leaving a true and attested copy thereof with Adolph Judell as an Individual — as a Member of and constituting the Board of Public Works of the City and County of San Francisco a Municipal Corporation personally at San Francisco in said District on the 14th day of June, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal,
By LAWRENCE J. CONLON,
Office Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpœna In Equity on the therein-named Daniel G. Fraser as an Individual — as a Member of and constituting the Board of Public Works of the City and County of San Francisco a Municipal Corporation by handing to and leaving a true and attested copy thereof with Daniel G. Fraser as an Individual — as a Member of and constituting the Board of Public Works of the City and County of San Francisco, a Municipal Corporation personally at San Francisco in said District on the 14th day of June, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal,
By LAWRENCE J. CONLON,
Office Deputy.

91 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpœna In Equity on the therein-named City and County of San Francisco, a Municipal Corporation by handing to and leaving an attested copy

thereof with James Rolph, Jr., who is the Mayor of the City and County of San Francisco, a Municipal Corporation personally at San Francisco in said District on the 14th day of June, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By LAWRENCE J. CONLON,
Office Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpœna In Equity on the therein-named M. M. O'Shaughnessy as an individual and as City Engineer of the City and County of San Francisco a Municipal corporation by handing to and leaving a true and attested copy thereof with M. M. O'Shaughnessy as an Individual and as City Engineer of the City and County of San Francisco, a Municipal corporation personally at San Francisco in said District on the 13th day of June, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By LAWRENCE J. CONLON,
Office Deputy.

92 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpœna In Equity on the therein-named Thomas A. Cashin as an individual and as Superintendent of the Municipal Railroads of the City and County of San Francisco, a Municipal corporation by handing to and leaving a true and attested copy thereof with Thomas A. Cashin as an Individual and as Superintendent of the Municipal Railroads of the City and County of San Francisco, a Municipal corporation personally at San Francisco, in said District on the 13th day of June, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By LAWRENCE J. CONLON,
Office Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpœna In Equity on the therein-named T. A. Riordan as an Individual — as

a member of and constituting the Board of Public Works of the City and County of San Francisco a Municipal Corporation by handing to and leaving a true and attested copy thereof with T. A. Riordan as an Individual — as a member of and constituting the Board of Public Works of the City and County of San Francisco, a municipal corporation, personally at San Francisco in said District on the 13th day of June, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal,
By LAWRENCE J. CONLON,
Office Deputy.

Endorsed: Filed Aug. 10, 1916. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

93 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 280.

In Equity.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

versus

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al., Defendants and Respondents.

Affidavit.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

M. McCants, being first duly sworn, deposes and says: That he is the Chief Clerk of William von Phul, the Vice President and General Manager of United Railroads of San Francisco, a corporation, the complainant in the above entitled action, and as such Chief Clerk he knows of the construction of the railway being built by the defendant City and County of San Francisco; that said railway is now constructed along Church Street from the easterly side of 16th Street to 18th Street, thence through private property to 20th and Church Streets, thence along Church Street to 30th Street; that he is familiar with the ordinances of the City and County of San Francisco directing and ordering the building and construction of the railway by said City and County from the intersection of Market and Church Streets along Market Street to and connecting with the rail-
94 way tracks of said City and County of San Francisco now on Van Ness Avenue; that it is the purpose of the City and County of San Francisco, defendant herein, to construct its said street railway from the intersection of Church and 16th Streets along Church Street and parallel with but outside of the rails of United

Railroads of San Francisco, complainant herein, on said Church Street, thence curving into Market Street and crossing the tracks of the United Railroads of San Francisco, complainant herein, at Church and Market Streets, and thence along Market Street and parallelling the tracks of the line of railway of United Railroads of San Francisco on Market Street but outside thereof to Van Ness Avenue, and thence curving into Van Ness Avenue and crossing the tracks of said United Railroads of San Francisco at Van Ness Avenue and Market Street; that in so building and constructing and laying down said tracks of said street railway as aforesaid the said tracks of said railway of said City and County of San Francisco will necessarily cross the tracks of said United Railroads of San Francisco at the following points, namely: the westerly track of said railway of said City and County of San Francisco will cross the double tracks of said United Railroads of San Francisco at Church and Market Streets, and proceeding down Market Street the northerly track of said railway of said City and County of San Francisco will cross the double tracks of United Railroads of San Francisco at Haight and Market Streets; that in so building, constructing and laying down the railway of said City and County of San Francisco the easterly track of said railway of said City and County of San Francisco on Church Street will cross the double tracks of United Railroads of San Francisco at Church and 16th Streets, and continuing down the easterly side of Church Street will curve
95 into Market Street, and continuing down the south side of Market Street will cross the double tracks of United Railroads of San Francisco at Valencia and Market Streets and the double tracks of United Railroads of San Francisco at 12th and Market Streets, and in curving into Van Ness Avenue at Market Street will cross the double tracks of United Railroads of San Francisco on Market Street at Van Ness Avenue; that in crossing each of the tracks of United Railroads of San Francisco as herein alleged said City and County of San Francisco will be compelled to and will cut the rails of United Railroads of San Francisco at each of the points herein stated, and will require the substitution of special crossings thereat; that in cutting the rails as above set forth and installing the specially constructed crossings above mentioned, the City and County of San Francisco will necessarily cut the electric bonding wires of the complainant which return the electric current used in operating cars to the power houses maintained by United Railroads of San Francisco for the operation of its cars over each of the tracks herein referred to, and will stop, interfere with, delay, obstruct and impede the operation of said cars by complainant during the progress of said work and thereafter while cars are being run over said crossings;

That on June 12th, 1916, United Railroads of San Francisco received from M. M. O'Shaughnessy, City Engineer of the defendant City and County of San Francisco, plans of the proposed track special work to be built, constructed and installed at each of the crossings herein referred to, showing in detail the work which said City and County proposes and intends to do in crossing complain-

ant's tracks at said points; that in accordance with the plans and proposals of said City and County as aforesaid affiant was told by
Assistant City Engineer Eckert, of the City and County of
96 San Francisco, that it would actively commence the work
of building, constructing and installing said crossings across the tracks of United Railroads of San Francisco as herein stated, and in that connection informed affiant that said City and County of San Francisco would commence the work of building and installing said crossings at Van Ness Avenue and Market Street in said City and County of San Francisco, and would cut the rails of United Railroads of San Francisco at Van Ness Avenue and Market Street as soon as they could prepare the roadbed therefor; that in pursuance of said notification said City and County of San Francisco, with a gang of workmen and under the charge and direction of T. A. Reardon, Daniel G. Fraser and Adolph Judell, as and constituting the Board of Public Works of said City and County of San Francisco, defendants herein, and Thomas A. Cashin, Superintendent of the Municipal Railways of the City and County of San Francisco, also one of the defendants herein, did on to-wit, June 12th, 1916, at about the hour of 2:15 o'clock in the afternoon of said day, actually commence the work of excavating the street at Van Ness Avenue and Market Street, and did actually dig and tear up a part of the pavement on Market Street immediately north of the northerly track of United Railroads of San Francisco on Market Street at the intersection of Van Ness Avenue, and did actually dig and tear up the pavement between the rails of the northerly track of said complainant on Market Street at said point; that said work of digging and tearing up said pavement at said point is now actively under way, and it is the declared purpose and intention of the defendants herein to continue the work of digging up and excavating the pavement between the tracks of United Railroads of San Francisco at Van Ness Avenue and Market Street, and to cut the
97 rails of complainant's tracks thereat, and to install the special
crossing at said point hereinabove mentioned; that the work thus done is but a part of the work which it is the declared purpose and intention of said defendants to do at the various points and crossings herein referred to, and is a part of the Municipal Railway system along Market Street from the easterly portal of the Twin Peaks Tunnel to Church Street, and from Van Ness Avenue to the existing Municipal Railway tracks in Market Street at Kearny Street, and said defendants declare that they will continue to dig and tear up the pavement at each of the points herein mentioned between the rails and tracks of complainant at each of the points herein mentioned until all of said special track crossings are built, constructed and installed as a part of the Municipal Railway system projected and being constructed as aforesaid, and will build and construct the said Municipal Railway system along Market Street from the easterly portal of the Twin Peaks Tunnel to Church Street, and from Van Ness Avenue to the existing Municipal Railway tracks in Market Street at Kearny Street; that the pavement already dug and torn up at the point above mentioned between the

rails of the northerly track and for two feet on the northerly side thereof and the pavement between the northerly and southerly tracks and between the southerly tracks and for two feet to the southerly side thereof, was laid and maintained by the complainant United Railroads of San Francisco at its own cost and expense; that the work of digging and tearing up the pavement laid and maintained by United Railroads of San Francisco between the northerly and southerly tracks on Market Street at said point and between the rails of the southerly track at said point and for two feet southerly from said southerly track is now actually pro-
98 ceeding, and the property of the complainant at said point is now in process of destruction, and unless a restraining order is immediately issued the tracks will be cut, the pavement will be destroyed and extensive excavations under complainant's tracks will be made and the railroad ties upon which said tracks rest will be disturbed and removed, and the bonding wires cut, and said special crossing installed, and, as affiant is informed and verily believes the cutting of said rails will commence at some hour during this day, which cannot be stated, and the danger of such cutting is now imminent;

That by reason of the facts hereinbefore stated the defendants have taken forcible possession of the property of complainant and do now remain in possession thereof, and immediate and irreparable injury, loss and damage will result to complainant before notice can be served on the defendants and a hearing had thereon; that the complainant has no means of preventing a destruction of its said property and such destruction will continue unless said defendants are immediately restrained by this Court. M. McCANTS.

Subscribed and sworn to before me this 13th day of June, 1916.
[NOTARIAL SEAL.] CHARLES E. REITH,
Notary Public in and for the City and County of San Francisco, State of California.

99 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,
versus
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al.,
Defendants and Respondents.

Affidavit.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. Harry Mentz, being first duly sworn, deposes and says: That he is an employe of United Railroads of San Francisco, a corpora-

tion, complainant in the above entitled action, and as such was detailed by said complainant to watch the tracks and roadbed of the complainant on Market Street at the intersection of Van Ness Avenue on the 12th day of June, 1916; that on said 12th day of June, 1916, at the hour of about 2:15 o'clock P. M., he saw a gang of workmen, with foreman, commence the work of digging and tearing up the pavement of Market Street at the intersection of Van Ness Aveune at a point immediately north of the northerly track of the complainant and saw the said work continue until the pavement had been torn up between the rails of said northerly track and for several feet immediately north thereof; that said work proceeded until about the hour of five o'clock P. M. of said day when red lanterns were placed about said excavation and said workmen departed; that this morning at the hour of about 8:00 o'clock A. M., affiant again went to the same place and saw the work of tearing up and digging said pavement proceeding and the same was proceeding when affiant left said point at 8:00 o'clock A. M.; that while said work was proceeding as aforesaid affiant saw Thomas A. Cashin, Superintendent of the Municipal Railways of the City and County of San Francisco, at the place where said work was going on, and apparently in charge of said work.

J. HARRY MENTZ.

Subscribed and sworn to before me this 13th day of June, 1916.

[NOTARIAL SEAL.] CHARLES E. REITH,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Filed Jun- 13, 1916. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

101 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

versus

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward I. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Order to Show Cause and Temporary Restraining Order.

On the 13th day of June, 1916, the above named complain-
102 ant appeared by Messrs. Garret W. McEnerney, Wm. M. Abbott and Wm. M. Cannon, as solicitors, and moved the Court for the issuance of an order to show cause directed to the defendants and each of them requiring them to appear in this Court, at a time and place to be named, then and there to show cause, if any they had, why a preliminary injunction should not be issued in said action enjoining and restraining said defendants and each of them, their officers, agents, servants, employes and attorneys, and all those persons in active concert or participating with them, during the pendency of this action, from doing or suffering to be done or in any manner aiding in the doing of any of the acts hereinafter set forth, and also moved the Court for the issuance of a temporary restraining order directed to said defendants and each of them, their officers, agents, servants, employes and attorneys, and all those in active concert or participating with them, from doing or suffering to be done

or aiding in doing any of the acts or things hereinafter set forth and described; and it appearing to the Court from the verified bill of complaint on file, and from the affidavits of M. McCants and J. Harry Mentz on file in said cause, that a proper case has been shown for the issuance of said order to show cause, and it further appearing from said verified bill of complaint and affidavits that the said defendants, their officers, agents, servants and employes, and those in active concert and participating with them, have already dug and torn up a part of the pavement on Market Street several feet northerly from the northerly track on Market Street at the intersection of Van Ness Avenue and between the rails of the northerly track of complainant on Market Street at said point, and that the work of digging and tearing up the pavement between complainant's tracks and
103 between the rails of complainant's southerly track at said point is now actually proceeding and that said work is now being done in order that defendants may make extensive excavations between and under complainant's tracks at said point, and preparatory to displacing and removing the ties upon which said tracks rest and preparatory to cutting the said tracks of complainant at said point and installing a crossing thereat; and it further appearing that by the continuance of said work complainant's property rights will be invaded and its service to the public obstructed and impeded and that it has not and will not have any means of being adequately compensated for the injury being done to its property by the continuance of said work, and that the doing of said work constitutes a continuing trespass upon the property rights of complainant; and it further appearing that said work may be completed before notice of the application for a temporary restraining order can be given and a hearing had thereon; and it further appearing that the further prosecution of said work or any part thereof will cause immediate and irreparable injury, loss and damage to complainant before notice can be served on defendants and a hearing had thereon, and that it is therefore necessary that a restraining order should be issued herein without notice to defendants or any of them, and the Court being fully advised:

Now therefore, it is hereby ordered, that the defendants and each of them, their officers, agents, servants, employes and attorneys, and all those in active concert or participating with them, be, and each of them hereby is, required to show cause before the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Second Division, if any they have, at the court room of said United States District Court, in the City and County of
104 San Francisco, in the Post Office Building, on the northeast corner of Seventh and Mission Streets, on the 19th day of June, 1916, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as the Court may hear the same, why a preliminary injunction should not be issued enjoining and restraining them, the said defendants, and each of them, their officers, agents, servants, employes and attorneys, and those in active concert or participating with them, during the pendency of this action, from constructing said Municipal Street Railway line on Market Street from 17th Street to

and across Third Street, and from the intersection of Van Ness Avenue and Market Street, thence along Market Street to the intersection of Church and Market Streets, thence along Chuch Street to 16th Street, and from cutting any of the tracks or rails of said complainant at the intersection of Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, Market and Polk Streets, Market Street and Van Ness Avenue, Market and Church Streets, and at Church and 16th Streets; and likewise enjoining and restraining them and each of them, the said defendants, their officers, agents, servants, employes and attorneys, and those in active concert and participating with them, from carrying out or consummating or taking any steps or measures to carry out or consummate the surveying, constructing for the survey, building, owning, or operating or constructing any line or lines of street railroad in the City and County of San Francisco over and along Market Street commencing at the intersection of Market and 17th Streets, thence along Market Street to and across Third Street, or commencing at the intersection of Market Street and Van Ness
105 Avenue, thence along Market Street to the intersection of Market and Church Streets, thence along Church Street to 16th Street, and from cutting or crossing any of the tracks or rails of said complainant at 16th and Church Streets or at Market and Church Streets or at Market Street and Van Ness Avenue, or at Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, at Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets and at Market and Polk Streets;

And it is further ordered that in the meantime and for the period of ten (10) days from and after this date, and for such further time as the Court may hereafter order for good cause shown and entered in the record, said defendants, their officers, agents, servants, employes and attorneys, and those in active concert and participating with them, be and they are hereby restrained from digging or tearing up any of the pavement on Market Street at the intersection of Van Ness Avenue and between the rails of the northerly track of complainant on Market Street at said point or between said tracks or between the rails of the southerly track of complainant at said point or for two feet northerly or southerly from said northerly and southerly tracks, and from making any excavations between the rails of said tracks or between said tracks or within two feet northerly or southerly of said northerly and southerly tracks, and from displacing or removing any of the ties upon which said rails rest, or from cutting the rails of said tracks at said point or any of said rails, or from cutting the bonding wires of said rails at said point or any of them, or from installing at said point any street railroad track or tracks across the tracks of complainant at said point, or any street railroad crossing at said point whatever;

106 And it is further ordered that upon the signing of this order complainant give a bond in the sum of $5,000.00, to cap-

proved by the Judge of this Court, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby, and this temporary restraining order shall be in full force and effect upon the approval of said bond by the Judge of this Court and the filing thereof with the Clerk of this Court;

And it is further ordered that a copy of this order to show cause and temporary restraining order be served on said defendants and each of them at least five (5) days before said hearing.

Dated this 13th day of June, 1916, at the hour of 10 o'clock A. M.

WM. C. VAN FLEET, *Judge.*

The bond required by the above order has this day been filed with the undersigned, Clerk of said Court, with the approval of the Judge of said Court endorsed thereon.

Dated June 13th, 1916.

WALTER B. MALING, *Clerk.*
By J. A. SCHAERTZER,
Deputy Clerk.

Endorsed: Filed Jun- 13, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

107 Title of Court and Cause.

Bond.

Know all men by these presents: That we, United Railroads of San Francisco, a corporation, as principal, and National Surety Company, a New York Surety Corporation, as surety, are held and firmly bound unto the City and County of San Francisco, a Municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a Municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation, in the sum of $5,000.00, to be paid the said obligees and their respective legal representatives, for which payment well and truly to be made we bind ourselves, jointly

and severally, and our respective legal representatives, successors and assigns, firmly by these presents.

Sealed with our seals this 13th day of June, A. D. 1916.

Whereas, the above bounden principal, United Railroads
108 of San Francisco, obligor, has filed its bill of complaint in the District Court of the United States, Ninth Circuit, in and for the Northern District of California, against the City and County of San Francisco, a Municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a Municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation, and each of them, and has applied to this Court for a temporary restraining order temporarily restraining the said defendants and each of them, their officers, agents, servants, employes and attorneys, and those in active concert and participating with them, from digging or tearing up any of the pavement on Market Street at the intersection of Van Ness Avenue and between the rails of the northerly track of complainant on Market Street at said point or between said tracks or between the rails of the southerly track of complainant at said point or for two feet northerly or southerly from said northerly and southerly
109 tracks, and from making any excavations between the rails of said tracks or between said tracks or within two feet northerly or southerly of said northerly and southerly tracks, and from displacing or removing any of the ties upon which said rails rest, or from cutting the rails of said tracks at said point or any of said rails, or from cutting the bonding wires of said rails at said point or any of them, or from installing at said point any street railroad track or tracks across the tracks of complainant at said point, or any street railroad crossing at said point whatever; and

Whereas, said Court did on, to-wit, June 13th, 1916, issue a temporary restraining order restraining said defendants and each of them, their officers, agents, servants, employes and attorneys, and those in active concert and participating with them, from doing any or all of the acts hereinabove particularly specified, upon complainant's giving a bond, to be approved by this Court, in the sum of $5,000.00, conditioned upon the payment of such costs and damages as

may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby:

Now, therefore, the condition of the above obligation is such that if the above bounden principal, United Railroads of San Francisco, a corporation, its legal representatives, successors or assigns, shall well and truly pay to said defendants and each of them such costs and damages as may be incurred or suffered by them or any of them who may be found to have been wrongfully restrained or enjoined by said temporary restraining order, then the above obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and corporate seals this 13th day of
110 June, A. D. 1916.

UNITED RAILROADS OF SAN FRANCISCO,
By JESSE W. LILIENTHAL, *President*.

Attest:

[Seal United Railroads of San Francisco.]

GEO. D. WILCUTT, *Secretary*.

[Seal National Surety Co.]

NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Its Attorney in Fact.

Approved this 13th day of June, 1916, at the hour of 11:50 o'clock A. M.

WM. C. VAN FLEET, *Judge*.

Endorsed: Filed Jun- 13, 1916. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

111 At a Stated Term, to wit, the July Term, A. D. 1916, of the District Court of the United States of America in and for the Northern District of California, Second Division, Held at the Court-room, in the City and County of San Francisco, on Monday, the 31st Day of July, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable William C. Van Fleet, District Judge.

Equity. 280.

UNITED RAILROADS OF SAN FRANCISCO
vs.
CITY AND COUNTY OF SAN FRANCISCO.

(*Order Continuing Hearing on Application for Injunction, etc.*)

By consent of counsel for defendant, it is ordered that hearing on the application for an injunction pendente lite be continued until

the final hearing after issue joined, and that the restraining order remain in force until decision.

112 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

versus

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward L. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Amended Bill of Complaint for Injunction.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of California, in
113 Chancery Sitting:

The United Railroads of San Francisco, a corporation, brings this its Bill of Complaint against the City and County of San Francisco, a Municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a Municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and

as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation, and respectfully represents to your Honors as follows:

I.

Your orator is, and ever since the 4th day of March, 1902, has been, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business and offices in the City and County of San Francisco, in the Northern District of California.

Each and all of the defendants herein named, save and
114 except the City and County of San Francisco, a Municipal corporation, are residents of the City and County of San Francisco, in the Northern District of California, and citizens of the State of California.

II.

The defendant City and County of San Francisco was in the year 1870, ever since has been, and now is, a Municipal corporation and body politic and corporate, and one of the political subdivisions of the State of California, organized and existing under and by virtue of the Constitution and Laws of the State of California, and known and designated by the name of the City and County of San Francisco. Said City and County is governed by a freeholders' charter adopted by the People in conformity with the provisions of the Constitution of the State. Said charter was adopted by the people of said city and county on the 26th day of May, 1898, and was ratified by the Legislature of the State on the 26th day of January, 1899, and subsequently, and on December 4th, 1902, November 5th, 1907, November 15th, 1910, December 10th, 1912, and March 16th, 1915, amended in the manner prescribed by law and said charter and the amendments thereto, are hereby referred to and made a part hereof. The said City and County is situated at the head of a peninsula bounded by the Pacific Ocean, Golden Gate, and San Francisco Bay, and the territory thereof, excluding the surrounding water, comprises 41.612 square miles. The City of San Francisco has a population of 525,000 or over, 315,000 of which occupy an area of approximately 21.382 miles in the northeasterly part of said City and County territory. The remaining 215,000 of said population *is* scattered throughout the rest of said territory. The remaining
115 part of said peninsula, which extends southerly a distance of approximately 50 miles by an average width of about 17.6 miles, has a population of about 90,000, which includes the population of a number of small towns and municipalities. Across San Francisco Bay from said peninsula are situated the cities of Oakland, Berkeley and Alameda, besides other smaller municipal-

ities, all of which contain a population of about 298,000. Including San Francisco the total population of the counties bordering on San Francisco Bay approximates 1,000,000. During the past six years the population of the City and County of San Francisco has increased about 108,088, being at the average rate of 3.9% per year, and it is now increasing at a greater ratio.

III.

By an act of the Legislature of the State of California entitled, "An Act Concerning Street Railroads," approved March 29th, 1870, and as amended by the said Legislature of the State of California April 4th, 1870, and in and by virtue of Section 497 of the Civil Code of the State of California, approved March 21st, 1872, and as the same was amended by the Legislature of the State of California March 3rd, 1876, the State of California delegated to and conferred upon the Board of Supervisors of the said City and County of San Francisco the right to grant to a corporation the right and authority to construct and operate street railroads for the period of fifty years through the streets and public highways in said City and County, and under certain conditions and provisions as provided in said acts of the Legislature, to which reference is hereby specially made, and such right existed and was in full force and effect at all times herein mentioned.

116 IV.

The defendant James Rolph, Jr., is now, and ever since the 8th day of January, 1916, has been, the duly elected, qualified and acting Mayor of said City and County of San Francisco;

At all the times since the 8th day of January, 1916, the defendants Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks have been and now are the duly elected, qualified and acting members of the Board of Supervisors of said City and County of San Francisco.

The defendants T. A. Reardon, Daniel G. Fraser and Adolph Judell are now and were at all the times herein mentioned and complained of the duly appointed, qualified and acting members of the Board of Public Works of the defendant City and County of San Francisco, and they do now constitute, and did at all times herein mentioned and complained of constitute, the Board of Public Works of said City and County of San Francisco.

The defendant Thomas A. Cashin is now, and at all the times herein mentioned and complained of was, the duly appointed, qualified and acting Superintendent of all the Municipal Railways of said City and County of San Francisco, and particularly of the Municipal Railway over and along and upon Church Street and over, along and upon Van Ness Avenue in said City and County of

San Francisco, and is now, and was at all said times, in the executive control of said Municipal Railways;

The defendant M. M. O'Shaughnessy is now, and was at all the times herein mentioned and complained of, the duly appointed, qualified and acting City Engineer of the defendant City and County of San Francisco, a Municipal corporation, and ap-
117 pointed by said T. A. Reardon, Daniel G. Fraser and Adolph Judell as and constituting the said Board of Public Works of the City and County of San Francisco.

V.

The Market Street Railway Company of San Francisco was on September 15th, 1879, ever since has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of California. Said Market Street Railway Company of San Francisco was created and organized for the purpose of constructing, owning and operating street railroads, particularly in the City and County of San Francisco, and ever since its incorporation has been, and up to the times herein mentioned was, actively engaged in constructing, owning and operating street railroads in said City and County of San Francisco.

Your orator was created and organized for the purpose, among other things, of constructing, owning and operating street railroads in the City and County of San Francisco and the County of San Mateo, and ever since its incorporation has been and now is actively engaged in constructing, owning and operating street railroads in said City and County of San Francisco and County of San Mateo.

VI.

Your orator is the owner and holder of real and personal property situate in the City and County of San Francisco, State of California assessed and liable to be assessed for taxes and to have taxes levied thereon for the purpose of providing revenues for the support of the municipal government of the said City and County of San Francisco, and more particularly for the purpose of providing a sinking
118 fund in the treasury of said City and County to pay the interest accruing upon and to redeem at their maturity at full face value any bond or bonds which may be issued by the said City and County for the acquisition, construction or completion of the railroad by the defendant, City and County of San Francisco, as more specifically hereinafter set forth. Your orator is now and at all said times has been an ad valorem taxpayer of the City and County of San Francisco. For the fiscal year ending June 30th, 1916, your orator has been assessed for taxes on non-operative property, and has paid to the City and County of San Francisco as and for said taxes, the sum of $7,114.76. Said assessment of $7,114.76 does not include but is exclusive of the percentages due and payable to said defendant City and County of San Francisco under the various franchises now owned and possessed by your orator and under which it is running and

operating its railway system in the City and County of San Francisco. In addition to said sum your orator has paid to the State of California as and for taxes levied on its operative property within the City and County of San Francisco for the fiscal year ending June 30th, 1916, the sum of $439,938.86. For the calendar year ending December 31st, 1914, your orator paid to the said defendant City and County of San Francisco, during that year and the year 1915, as a percentage of the receipts of lines operated under said franchises, the sum of $48,970.29. For the calendar year ending December 31st, 1915, your orator will pay to said defendant City and County of San Francisco, as a percentage of the receipts from lines operated under said franchises under which your orator is operating its said railway system in said City and County, a sum substantially the same as that for the year 1914 as hereinabove set forth. The statement of the amount due thereunder has not yet been made or ac-
119 cepted by said City and County, but your orator is liable therefor and will pay the same to said City and County immediately upon the acceptance by said City and County of the amount thereof as shown by the statements to be filed therefor.

In addition to the payments hereinabove set forth your orator pays an annual license tax on the cars operated by it in said City and County of San Francisco, and for the year ending December 31st, 1915, your orator has paid said City and County of San Francisco as and for a license tax upon said cars aforesaid the sum of $9,300.00.

VII.

On the 15th day of September, 1879, the Board of Supervisors of said City and County of San Francisco was a body to whom was entrusted the government of said City and County of San Francisco, and upon whom had been delegated by the State of California, through its Legislature, the authority to grant franchises to persons or corporations to operate and maintain street railroads and lay railroad tracks through the streets and public highways of said City and County of San Francisco, as is also above set forth;

On or about the 15th day of September, 1879, the Board of Supervisors of said City and County of San Francisco duly and regularly passed an ordinance known and designated as Order No. 1514, entitled, "Granting to the Market Street Railway Company of San Francisco certain rights and privileges therein specified," under and by virtue of the provisions of which order said City and County of San Francisco did grant unto the said Market Street Railway Company of San Francisco, its successors and assigns, a franchise, right of way and privilege to construct, lay down, maintain and
120 operate, for the term of fifty years from and after the date of the passage of said order, a single or double track street railroad along and upon certain streets in said City and County of San Francisco, and more particularly, among others: Commencing at the City Front on Market Street, and thence along Market Street to 17th Street. On the 20th day of September, 1879, the Mayor of the City and County approved said order in the manner provided by

law. A copy of said order is hereunto attached, marked "Exhibit A," and is hereby specifically referred to and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

On or about the 29th day of May, 1892, the Board of Supervisors of the City and County of San Francisco duly and regularly passed an ordinance known and desigated as Order No. 1676, entitled, "To amend Section One of Order No. 1514, granting to the Market Street Railway Company of San Francisco certain rights and privileges therein specified, approved September 20th, 1879," under and by virtue of the provisions of which order said City and County of San Francisco did amend Section One of said Order No. 1514 herein in this paragraph referred to, and under and by virtue of which order Section One thereof was amended so as to make the terms thereof to run for fifty years frou and after the date of the passage thereof. Thereafter and on June 5th, 1882, the Mayor of said City and County approved said order in the manner provided by law. A copy of said order is hereto attached, marked "Exhibit B," and is hereby specifically referred to and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

VIII.

121 Said Market Street Railway Company of San Francisco duly accepted the franchises granted by said Orders 1514 and 1676, (Exhibits A and B herein), and within ten days after the passage of Order 1514 did file in the office of the clerk of the Board of Supervisors of the City and County of San Francisco its said acceptance in writing of the provisions of said Order 1514, as required by Section 12 thereof, which acceptance in writing was under the corporate seal of said Market Street Railway Company of San Francisco, signed by the President and countersigned by the Secretary thereof.

IX.

Within the time limited by said orders and by law said Market Street Railway Company of San Francisco did perform all the conditions on its part required by said orders or by law to be performed, and more particularly did complete the construction of a double track street railroad along and upon Market Street in said City and County, Commencing at the City Front running thence along and upon Market Street, crossing (among others) Van Ness Avenue and Oak Street, Franklin and Page Streets, Rose Avenue, Gough and Haight Streets, Octavia and Waller Streets, Laguna and Hermann Streets, Buchanan Street and Duboce Avenue, Reservoir Street and 14th Street to 17th Street.

X.

On or about the 31st day of May, 1882, the said Market Street Railway Company of San Francisco did assign, transfer and con-

vey unto the Market Street Cable Railway Company all its right, title and interest in and to said franchises, privileges and rights of way heretofore referred to as Orders 1514 and 1676 (Exhibits A and B herein). Thereupon said Market Street Cable Railway Company did enter into the possession and enjoyment of all the rights, privileges and franchises theretofore possessed, exercised and
122 enjoyed by said Market Street Railway Company of San Francisco, and more particularly did enter upon the construction, maintenance and operation along and upon Market Street in said City and County of San Francisco from the City Front on Market Street to 17th Street, as aforesaid, of a double track street railroad, and from said date was the owner and in the enjoyment and possession and entitled to the enjoyment and possession of all of said rights, privileges and franchises, and more particularly of the right, privilege and franchise to maintain and operate along and upon said streets said double track street railroads, and continued in said enjoyment and possession down to and including the 13th day of October, 1893, as hereinafter more particularly set forth and alleged.

XI.

On or about the 13th day of October, 1893, the several capital stocks, debts, properties, assets and franchises of the Market Street Cable Railway Company and certain other street railway corporation were consolidated and amalgamated into one corporation under the name and style of the Market Street Railway Company, and articles of consolidation, amalgamation and incorporation were filed in the office of the Secretary of State of the State of California on the 14th day of October, 1893. A copy of said articles of consolidation, amalgamation and incorporation is hereunto annexed, marked "Exhibit C," and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full. Immediately thereafter the said Market Street Railway Company entered into the possession of the rights of way granted by said Orders Nos. 1514 and 1676, and of the railroads constructed and operated thereunder, and all the other street railroads and
123 franchises described in said "Exhibit C," and continued in the possession and operation thereof down to and including the 18th day of March, 1902, as hereinafter more particularly set forth and alleged.

XII.

On or about the 15th day of April, 1895, the said Board of Supervisors of said City and County of San Francisco duly and regularly passed an order known and designated as Order No. 2858 entitled, "Granting to the Market Street Railway Company, its successors and assigns, certain rights and privileges herein specified," under and by virtue of the provisions of which order the said Market Street Railway Company, its successors and assigns, was granted a fran-

chise, right of way and privilege to construct, maintain, lay down and operate, for the unexpired terms of the respective franchises heretofore granted on the streets between which the connections in said order referred to are to be made, a single or double track street railroad along and upon certain streets in said City and County of San Francisco, and more particularly, among others: Commencing from a connection with the line of the Market Street Railway Company on 16th Street at or near its intersection with Church Street, thence along and upon Church Street to Ridley Street (now Duboce Avenue), thence along and upon Ridley Street (now Duboce Avenue) to Fillmore Street to a connection with the line of the Market Street Railway Company on Fillmore Street at or near its intersection with Ridley Street (now Duboce Avenue). A copy of said order is hereto attached, marked "Exhibit D," and is hereby specifically referred to and made a part of this bill of complaint to all intents and purposes as though the same were here set forth in full.

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XIII.

Said Market Street Railway Company duly accepted the franchises granted by said Order No. 2858 (Exhibit D herein), and on April 26th, 1895, did file in the office of the clerk of the Board of Supervisors of said City and County of San Francisco an acceptance in writing of the provisions of said order as required by Section 6 thereof.

XIV.

Thereafter and within the time required by law the said Market Street Railway Company did perform all the conditions on its part required by said orders or by law to be performed, and more particularly did commence and complete the construction of a double track street railroad along and upon Church Street from 16th Street to Ridley Street (now Duboce Avenue), thence along and upon Ridley Street (now Duboce Avenue) to Fillmore Street to a connection with the line of said Market Street Railway Company on Fillmore Street at or near its intersection with Ridley Street (now Duboce Avenue), and immediately thereafter continued in the possession and operation of the double track street railroad thereon down to and including the 18th day of March, 1902, as hereinafter more particularly set forth and alleged.

XV.

Thereafter and on or about the 18th day of March, 1902, your orator, United Railroads of San Francisco, by grant and transfer from the Market Street Railway Company, then duly executed and delivered, became the owner of and went into the possession of all the right, title and interest in and to the said franchises, rights of way and privileges hereinbefore referred to as Orders Nos. 1514,

125 1676 and 2858 (Exhibits A, B and D herein), and all other franchises and rights of way described in Exhibit "C," hereunto annexed, and thereupon your orator did enter into the possession and enjoyment of all the rights, privileges and franchises theretofore possessed, exercised and enjoyed by said Market Street Railway Company of San Francisco and Market Street Railway Company, its successors and assigns, in said orders and in said Exhibit "C" named, and more particularly did enter upon the maintenance and operation of street railroads along and upon all of the street railroad lines described in said Exhibit "C," and particularly along and upon Market Street, Commencing at the City Front on Market Street, thence along Market Street to 17th Street, and also Commencing at the intersection of 16th and Church Streets, thence over and along Church Street to Ridley Street (now Duboce Avenue), thence along and upon Ridley Street (now Duboce Avenue) to Fillmore Street, there connecting with the line of street railway on Fillmore Street, and ever since has been and now is the owner and in the enjoyment and possession and entitled to the enjoyment and possession of all the rights of way, privileges and franchises, and more particularly of the rights of way, privileges and franchises to maintain and operate along and upon said streets said double track street railroad, and ever since has been and now is so maintaining and operating the same.

Since said 18th day of March, 1902, your orator has acquired, leased and constructed other street railroad lines in said city and county, and is now engaged in operating the same as a part of and additions to the street railway system acquired on said 18th day of March, 1902, as hereinabove set forth. Said street railway system as now existing and in operation by your orator, consists of a net work of street railway lines of a total length of 245 miles, serving

126 the entire population of said city and county, and also extending southerly to the city of San Mateo, a distance of about 27 miles from said city and county, and giving street railroad service to the people of said city of San Mateo as well as to the people on said peninsula between said city and county and said city of San Mateo. A universal transfer system, so called, has been put into effect and operation by your orator and is now in effect and operation, by which passengers on any of the lines of said system, excepting such portion of the San Mateo line as is situated beyond the limits of said city and county, are enabled to freely transfer from any of said lines to the others without the payment of any additional fare. By the use of such transfer system, passengers on any of said lines are enabled to and do reach and transfer to the line of your orator situated on Market Street. A map of said city and county showing all of the street railway lines now in operation by your orator therein, is herewith annexed, marked "Exhibit E," and made a part hereof. Said Exhibit is a true and correct map of said city and county and the red lines thereon correctly exhibit the lines of street railway constituting the street railway system now in operation by your orator.

XVI.

Said franchises, grants, privileges and rights of way so granted as aforesaid by said City and County of San Francisco, referred to in Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), were so granted and accepted upon the express condition and provision that it should be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation than the grantee named in each of said orders, and no
127 more, the right to use the street or streets named therein for a distance of five blocks, and no more; and said grants, franchises, rights of way and privileges were made upon the terms and conditions specified in Section 499 of the Civil Code of the State of California as the said section existed in said Civil Code at the date of the passage and adoption of said orders, which said section of said Civil Code is in the terms and figures following, to-wit:

"499. Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

And in this connection your orator alleges that Section 5 of Order 1514 (Exhibit A herein), granting the right to build, construct and operate a street railroad along Market Street, commencing at the City Front on Market Street, thence along Market Street to 17th Street, is in the terms and figures following, to-wit:

"Sec. 5. It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the civil code of this State. The section shall apply to persons and companies, as well as corporations."

XVII.

On the 16th day of July, 1913, the Board of Supervisors of the City and County of San Francisco ordered a special election to be held in the City and County of San Francisco on the 26th day of August, 1913, for the purpose of submitting to the electors of said City and County the proposition, among other things, to incur a bonded indebtedness by said City and County of San Francisco for the construction by said City and County of a street railroad
128 over and along the following streets, to-wit:

On Ven Ness Avenue, and from such avenue along connecting streets to Church street, and along Church street to convenient terminals:

At said election said proposition was carried by a vote of the electors voting at said election as required by law.

XVIII.

Thereafter and on the 8th day of February, 1915, the Board of Supervisors of the City and County of San Francisco adopted an

898

ordinance known as Bill No. 3410, Ordinance No. 3110 (New Series), wherein and whereby it is ordained that the Board of Public Works is authorized, instructed and empowered to immediately prepare plans, specifications and contracts, and advertise for bids for furnishing the additional materials necessary for the construction of a Municipal Railway system for which funds were provided in the bond issue authorized August 26th, 1913, as aforesaid, along the following streets, to-wit:

Connecting with the tracks of the Van Ness avenue street railway at Market street, thence along Market street to Church street, thence along Church street to Eighteenth street, thence by a diversion through the westerly side of Mission Park to Twentieth street and Church street, thence across a right of way to be acquired through private property between Twentieth and Twenty-second streets to Twenty-second and Church streets, thence along Church street to Thirtieth street.

A copy of said Ordinance No. 3110 (New Series) is hereunto annexed, marked "Exhibit F," and expressly made a part hereof. Thereafter and on February 17th, 1915, said Bill No. 3410, Ordinance No. 3110 (New Series), was approved by the Mayor of said City and County of San Francisco.

XIX.

The defendants have declared by said Ordinance No. 3110 (New Series), (Exhibit F herein), that they intend to construct
129 build and operate a Municipal Street Railway from the intersection of Market Street and Van Ness Avenue, thence westerly along Market Street crossing Twelfth Street, Page and Franklin Streets, Rose Avenue, Brady Street, Haight and Gough Streets, Valencia Street, Octavia and Waller Streets, Pearl Street, Laguna and Hermann Streets, Guerrero Street, Buchanan Street and Duboce Avenue, Dolores Street, Reservoir Street, 14th Street, to and into Church Street, thence along and upon Church Street passing 14th Street, 15th Street and 16th Street. The distance from the intersection of Van Ness Avenue and Market Street, thence westerly along Market Street to the intersection of Church and Market Streets, thence along and upon Church Street to 16th Street, is more than five blocks, and said proposed Municipal Railway line, if so constructed, run and operated will be so constructed run and operated for a distance of more than five blocks over Market Street and Church Street, upon which your orator United Railroads of San Francisco has already built, constructed and is now running and operating its street railroad as aforesaid.

XX.

On the 1st day of May, 1916, the Board of Supervisors of said City and County of San Francisco adopted the resolution known as Resolution 12,887 (New Series), wherein and whereby it is resolved that the Board of Public Works be directed to proceed without delay to

complete said Church Street Railway from Church and 16th Streets to Market Street and thence along Market Street to Van Ness Avenue there connecting with the tracks of the Municipal Railway on Van Ness Avenue, in accordance with the provisions of Ordinance No. 3110 (New Series), (Exhibit F herein), such construction to
130 consist of double tracks laid outside of the rails of the railroad of your orator, and such overhead electrical construction and appurtenances as may be necessary. A copy of said Resolution 12,887 (New Series) is hereunto annexed, marked "Exhibit G," and hereby made a part of this amended bill of complaint to all intents and purposes as though the same were here set forth in full.

XXI.

On the 15th day of May, 1916, the said Board of Supervisors of said City and County of San Francisco adopted Bill No. 4059, Ordinance No. 3736 (New Series), and approved by the Mayor of said City and County on, to-wit, May 16th, 1916, entitled:

"Ordering and Providing for the construction of an extension of the Municipal Railway system along Market Street from the easterly portal of the Twin Peaks Tunnel to Church Street and from Van Ness Avenue to the existing Municipal Railway tracks in Market Street at Kearny Street,"

wherein and whereby the Board of Public Works was directed to prepare plans and specifications for the construction of an extension of the Municipal Railway system to consist of double tracks, crossovers, switches, and the like, and the necessary overhead electrical appurtenances from the easterly portal of the Twin Peaks Tunnel along Market Street to Church Street connecting with the tracks of the Municipal Railway in Van Ness Avenue, thence along Market Street and connecting with the tracks of the Municipal Railway in Market Street near Kearny Street, such construction to consist of double tracks laid outside of the railroad of your orator on Market Street from Kearny and Market Streets to 17th Street. A copy of said Bill No. 4059, Ordinance No. 3736 (New Series) is hereunto annexed, marked "Exhibit H" and hereby made a part of this amended
131 bill of complaint to all intents and purposes as though the same were here set forth in full.

XXII.

Market Street is the main artery and thoroughfare of the City and County of San Francisco. It extends from its intersection with the Embarcadero at the City Front in a southwesterly direction to its intersection with 17th Street, a distance of 3.13 miles. It is 120 feet wide throughout its entire length. Its sidewalks are 22 feet wide, leaving the distance between curbs 76 feet. It runs in a northeasterly and southwesterly direction, the northeasterly end being at the City Front on San Francisco Bay. On its southerly side it is

intersected at right angles by the following named streets; The Embarcadero, Steuart, Spear, Main, Beale, Fremont, First, New Montgomery, Second, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and Brady; and it is also intersected on the southerly side by Valencia, Pearl, Guerrero, Dolores, Church, Sanchez, Noe and Castro Streets, all of which run in a northerly and southerly direction, and by Duboce Avenue, Reservoir, 14th, 15th, 16th and 17th Streets. All of which run in an easterly and westerly direction. The streets intersecting it at right angles lie northeasterly of Valencia Street, while those intersecting it at other angles lie southwesterly of Valencia Street. On the northerly side it is intersected by the following named streets running northerly and southerly. The Embarcadero, Drumm, Davis, Front, Battery, Sansome, Montgomery, Kearny, Grant Avenue, Stockton, Powell, Mason, Taylor, Jones, Larkin, Polk, Van Ness Avenue, Franklin, Gough, Octavia, Laguna, Buchanan, Church, Sanchez Noe and Castro, and by the following named streets running easterly and westerly, to-wit: Sacramento,
California, Pine, Bush, Sutter, Post, Geary, O'Farrell, Ellis,
132 Eddy, Turk, Golden Gate Avenue, McAllister, Grove, Hayes, Fell, Oak, Page, Rose Avenue Haight, Waller, Hermann, Duboce Avenue, Reservoir, 14th, 15th, 16th and 17th Streets. In nearly every instance two of the above named streets intersect each other at their intersection with Market Street, making a continuous series of junctions of three streets from the Embarcadero to 17th Street. From Van Ness Avenue to Church Street the distance is more than five blocks.

XXIII.

From the City Front to 17th Street the center of Market Street is occupied by a double track street railroad of complainant. The distance between the two tracks is 6 feet and 10 inches, and the distance between the rails thereof is 4 feet $8\frac{1}{2}$ inches. The distance from the northerly and southerly curb lines of Market Street to the nearest rail of said tracks of complainant is substantially 29 feet and 6 inches. On the northerly and southerly sides of complainant's tracks between the City Front and Geary Street, a distance of 9 blocks, there are situated other street car tracks, making four tracks in all on that part of Market Street. Each of these tracks is situated about 5 feet 10 inches from the nearest center track and the distance between the rails is 4 feet $8\frac{1}{2}$ inches. The distance between the curb line and the nearest rail of each of these outer tracks is 18 feet 6 inches. The railway lines situated on Market Street are intersected and crossed at the following points by the following lines of this complainant, to-wit: First and Battery Streets line, 3rd and Kearny Streets line, 4th and Ellis Streets line, 6th and
133 Taylor Streets line, 9th and Larkin Streets line, 10th and Polk Streets line, Gough and Valencia Streets line, and the Church Street line. Said lines cross Market Street at the intersections of the streets above mentioned, and the routes thereof are set forth and delineated on the Map of the City and County of San Francisco,

hereunto annexed and marked "Exhibit E," to which reference is hereby made. Said street railway lines run into and serve densely populated parts of the City and County of San Francisco and about 50,000 passengers are daily carried upon the Market Street lines of complainant upon transfers issued from the said lines crossing Market Street, and about 40,000 passengers are daily carried upon said lines crossing Market Street upon transfers issued from the said Market Street lines.

On the northerly side of Market Street the lines of complainant on Market Street are intersected by the following named lines which do not cross the tracks but join them and use them in carrying their cars and passengers along Market Street from the various points of junction to and from the City Front, to-wit: Sutter Street line, Eddy and Turk Streets line, McAllister Street line, Haight Street line and Hayes Street line.

On the southerly side of Market Street the lines of the complainant are intersected by the following named lines which do not cross the tracks but join them and use them in carrying their cars and passengers along Market Street from the various points of junction to and from the City Front, to-wit: Valencia Street line and Castro Street line.

The routes of all the aforesaid lines intersecting and joining the Market Street lines are set forth and delineated on the Map of the City and County of San Francisco hereunto annexed and
134 and marked "Exhibit E," to which reference is hereby made.

Besides the foregoing intersections the tracks of the following named lines connect with the tracks of the complainant on Market Street at the following points, but at said points there are no regular lines of cars in operation, said connections being used for the purposes of switching, emergency and other incidental purposes, to-wit: Second Street line, Post Street line, Fifth Street line, Eighth Street line and Twelfth Street line.

All of the tracks belonging to or used in connection with each and all of the foregoing lines are of the same gauge as those situated on Market Street.

XXIV.

On the outer tracks now situated on Market Street, as above described, the complainant operates cars between the City Front and the intersection of Sutter, Sansome and Market Streets, and the defendant City and County of San Francisco operates cars from the City Front to the intersection of Geary, Kearny and Market Streets. All of the cars operated on said four tracks use a double loop (so-called) belonging to complainant and situated on the City Front at the intersection of Market Street and the Embarcadero as a means of turning around for the purpose of making their return trips, and such loops are used for that purpose under a permit issued by the Harbor Commissioners of the State of California to the complainant and the City and County of San Francisco jointly.

XXV.

There are two main inlets and outlets to and from the City of San Francisco for persons entering or leaving by way of water or rail, to-wit, at the City Front at the intersection of the Embarcadero and Market Streets, and at the intersection of 3rd and Townsend Streets. At the City Front all Ferry boats carrying pas-
135 sengers across the Bay converge and have their landings, and discharge and receive passengers entering and leaving the city. Said boats connect with trains running to various parts of the interior of the State and to the States lying to the north and east of California, and said boats also carry all of the local passenger traffic between San Francisco and points across the Bay, which is very heavy throughout the day and particularly so in the mornings and evenings. The railroad depot of the Southern Pacific Company is situated at 3rd and Townsend Streets, and at that point passengers entering and leaving San Francisco are discharged from and received into trains of the Southern Pacific Company operated in a northerly and southerly direction on the said Peninsula and running into various parts of the interior of the State of California, and also into eastern states of the United States. Persons entering or leaving San Francisco at the City Front may and do ride directly to and from the City Front on the cars of the complainant operated on Market Street as aforesaid, and on cars operated on the lines above described connecting with the tracks on Market Street, and by the use of transfers from cars of the lines above described, which intersect or cross the lines on Market Street. Persons entering or leaving the city at 3rd and Townsend Streets may and do use the 3rd and 4th Street lines of complainant above described, and may and do transfer in either direction at the intersection of said lines with Market Street as aforesaid. By means of the system of railway lines above described practically all persons entering and leaving San Francisco who use street cars for such purpose, and practically all persons living in San Francisco who use street cars in going to and returning from their places of business and on other
136 various errands, use the said Market Street lines of the complainant during all or some part of their various journeys. In other words, the street railroad lines crossing Market or converging into Market Street constantly pour innumerable passengers into the cars of the Market Street lines and receive numerous passengers therefrom.

XXVI.

Between the hours of 8 and 9 o'clock A. M., and the hours of 5 and 6 o'clock P. M., of each day, the cars of the following named lines operating into and upon Market Street and from other various termini to the City Front and return are operated upon the following headways, to-wit: Castro Street line at a headway of $2\frac{1}{2}$ minutes or 24 cars per hour; Valencia Street line $2\frac{1}{2}$ minutes or

24 cars per hour; Haight Street line 1¾ minutes or 33 cars per hour; Masonic Avenue line which intersects Market at Haight Street, 4 minutes or 15 cars per hour; Hayes and Oak Streets line 10 minutes or 6 cars per hour; Hayes Street line 6½ minutes or 9 cars per hour; McAllister Street line 2½ minutes or 24 cars per hour; Turk and Eddy Streets line 4½ minutes or 14 cars per hour; Sutter and Jackson Streets lines intersecting Market Street at Sutter Street 5½ minutes or 11 cars per hour; Sutter and Clement Streets line intersecting Market *and* Sutter Street 4½ minutes or 14 cars per hour; Sutter and California Streets line intersecting Market at Sutter Street, 4½ minutes or 13 cars per hour.

The hours above stated are usually denominated the rush hours and during such hours the headways of all cars operated on Market Street by the complainant including lines converging into Market Street, as above set forth, are as follows: Between 17th Street
137 and the intersection of Valencia and Haight Streets with Market Street 2½ minutes or 24 cars per hour; between Valencia and Haight Streets and the intersection of Hayes with Market Street 37 seconds or 96 cars per hour; between Hayes Street and the intersection of McAllister Street with Market Street 32 seconds or 111 cars per hour; between McAllister and the intersection of Eddy with Market Street 26 seconds or 135 cars per hour; between Eddy Street and the City Front on the center tracks of the complainant 24 seconds or 149 cars per hour; between Sutter Street and the City Front on the outer tracks 1 minute and 35 seconds or 38 cars per hour.

During the same hours the headway of cars operated by the defendant City and County of San Francisco on the outer tracks between Geary Street and the City Front is one minute and 4 seconds or 56 cars per hour; and the combined headway of cars operated on the outer tracks between Sutter Street and the City Front by the complainant and the City and County of San Francisco is 38 seconds or 94 cars per hour.

During the same hours the combined headway of all cars operated on the inner loop at the City Front is 37½ seconds or 96 cars per hour; and during the same hours the combined headway of all cars operated by the complainant and City and County of San Francisco on the outer loop at the City Front is 24 seconds or 147 cars per hour.

During the same hours the headways of lines intersecting and crossing Market Street average about 4 minutes and 17 seconds.

During the remaining hours of the day the headways of all cars are more or less increased according to the existing traffic conditions.

138 XXVII.

Under traffic regulations now in force in the City and County of San Francisco there have been established traffic crossings at the following points, to-wit: Beale Street, Drumm Street, First Street, Montgomery Street, Third Street, Fourth Street, and Sixth Street. At such crossings the Market Street traffic is regulated by police officers

who give at intervals different signals, one signal calling for traffic to proceed along Market Street and cross the particular intersection where the signal is given, while the cross traffic is stopped, the other signal calling for the cross traffic to proceed across Market Street while the traffic along Market Street is stopped. Such signals operate to stop all street cars as well as all other traffic on Market Street. During most of the business hours of the day, and particularly the rush hours when the traffic along Market Street is stopped by the use of such signals, the cars being operated at such brief headways collect at such crossings and remain there stationary until permitted by the proper signal to proceed. Between Geary Street and the Embarcadero the cars on all four of the tracks are thus obliged to come to a stop and collect one behind the others at such crossings, the cars upon the outer tracks thus covering or blanketing the cars on the inner tracks and making ingress to and egress from the same exceedingly difficult and dangerous and frequently impossible. At other points between Geary Street and the Embarcadero where the cars are permitted to move more freely the cars upon the outer tracks operating at such a brief headway make it exceedingly difficult and dangerous and frequently impossible for passengers to take passage upon or leave the cars operated upon the inner tracks. On
139 Market Street at the intersection of the Embarcadero, during the rush hours, on account of the exceedingly brief headway around the loop and the congestion of cars thereon, the cars on the two southerly or inbound tracks are obliged to stop one behind the others, thus leaving two lines of cars on Market Street, the outer line completely blanketing the cars on the inner tracks. At times such lines extend several blocks from the Embarcadero. Under present conditions, on account of accidents and various other causes, cars operating both ways on Market Street are frequently stopped for considerable periods of time and otherwise delayed. At such times cars following those stopped or delayed are obliged to stop or slowly follow delayed cars. This results in an accumulation of cars on the street on account of the short headway and increases the congestion. When such delays occur on the outer tracks between Geary Street and the City Front and cars are either stopped one behind the others or follow slowly one immediately after the others, it is impossible for any persons to either board or alight from the cars on the outer tracks. This is a frequent condition, and if outer tracks should be constructed as proposed such condition would exist for the entire length of Market Street and would be intensified between Geary Street and the City Front because of the additional cars that would be run over those tracks in such event.

XXVIII.

During all of the regular business hours of the day, and particularly during the rush hours, Market Street between the Embarcadero and Gough Street is extremely crowded with vehicles of all sorts and descriptions, and thousands of persons are engaged in crossing said street at different points at all times. This vehicular traffic,

140 and the street cars, and the necessity for great care to prevent injury to foot passengers crossing Market Street, and the traffic regulations requiring the stopping of the Market Street traffic at different points as above described, produce a state of extreme congestion in Market Street between the Embarcadero and Gough Streets, and such congestion is intensified between Montgomery and Sixth Streets, which area constitutes the busiest portion of the business section of the city.

On the northerly side of Market Street, between Church Street and the City Front, there are twelve safety stations situated at the following points, to-wit: First Street, Montgomery Street, Third Street, Grant Avenue, Fourth Street, Emporium, Fifth Street, Sixth Street, Jones Street, Gough Street, Fourteenth Street.

On the southerly side of Market Street there is one safety station situated near the intersection of Market and Third Streets. These safety stations consist of concrete platforms constructed about 6 inches above the pavement of the street, and are about 60 feet long by 6 feet in width. They are placed within about 2 feet 6 inches of the outer street railroad track, and their purpose is to enable people to stand thereon while waiting for a street car. Under the traffic ordinances and regulations now in force in the defendant City and County, the space occupied by the street railroad tracks is reserved for the passage of cars, and the traffic on the particular side of the street where a safety station is situated is obliged to pass between the safety station and the curb. Persons intending to take passage on a street car from a safety station cross the space intervening be-

141 tween the safety station and the sidewalk, threading their way through the congested traffic as best they can. Under present conditions the distance between safety stations and the sidewalk at points where there are but two tracks in the street is 21 feet. Such space is altogether too narrow to accommodate the present traffic and great congestion is thereby produced, and persons desiring to go to and from the safety station are constantly in danger from such congested traffic at such points. If additional tracks should be laid on the outside of the present tracks, as proposed, such safety stations would have to be removed altogether or set back between the outer rails of such additional tracks and the curb. In the latter event the space between the safety station and the curb would be only 10 feet, which would be utterly insufficient to handle the traffic, and the traffic would have to be diverted to the space occupied by the four tracks, which would greatly increase the danger of the operation of the cars and of all vehicles occupying such space, and would greatly retard and interfere with the progress of the cars. In the former event such persons would be obliged to stand in the street, without the protection afforded by the safety stations, while waiting to board cars.

XXIX.

If the defendant City and County of San Francisco builds and completes its proposed line on Church Street and Market Street between Church Street and Van Ness Avenue, connecting there with its

line on Van Ness Avenue, it will serve a territory which is densely populated, and if it builds and completes its proposed line on Market Street, between Kearny Street and Van Ness Avenue, connecting with its proposed Church Street and Van Ness Avenue line, it will, upon the completion of a tunnel through Twin Peaks now in course
142 of construction, and through which it is proposed to build a street railroad line, serve territory of said city and county which is now without direct service to Market Street, and which is already well populated, and in which the population is rapidly increasing. The establishment of either or both of said lines will render it necessary for the city and county to operate cars at a very brief headway, and complainant alleges, upon and according to its information and belief, that the headway of cars on Market Street on said proposed outer tracks will not be less than 2 minutes or 30 cars per hour during the rush hours. And in the event that both said lines should be constructed and operated said headway will be very much decreased. If cars should be operated by the defendant City and County of San Francisco upon said proposed outer tracks such cars would also be operated upon the outer tracks now situated on Market Street as above described, thus still greater decreasing the headway thereon, and still further reducing the headway and increasing the congestion around the Ferry loops.

XXX.

Between the cars operated on the inner tracks on Market Street at present there is a space or clearance of 2 feet and 9½ inches, and between the cars now operated on the outer tracks on Market Street and the cars operated on the inner tracks there is now a clearance of about 22½ inches. If said tracks should be constructed on Market Street as proposed there will be a clearance between the cars operated thereon and the cars operated on the inner tracks of only 22½ inches. The headways of all lines operated on Market Street will be so short that the center of said street, in other words all the space comprised between the outer rails of the outer tracks, including the over-
143 hang of the cars operated on the outer tracks, which is about 2 feet, will be necessary for the use of the cars, and other vehicular traffic on Market Street using said space will be in constant danger from the operation of cars. As a consequence the greater part of the Market Street traffic will be required to use the space between the outer rails of the outer tracks and the curbs, a distance of only 18 feet and 6 inches, and at points where there may be safety stations 10 feet. This space is altogether insufficient for the proper handling of such traffic, making it necessary for such traffic to occupy and use the space between the outer rails of the outer tracks, thus increasing the danger both to vehicles and cars, and the persons occupying each, as well as the pedestrians crossing Market Street, and materially interfering with the proper operation of cars.

XXXI.

The defendant carries daily upon all of its Market Street lines an average of over 200,000 passengers. Some of such passengers board said cars at different points on Market Street, some board said Market Street cars upon transfers issued from lines crossing and intersecting Market Street, some are carried on cars of the various lines intersecting Market Street and using the center and outer tracks, and some board said cars at the City Front, but all of such passengers use said Market Street lines for either all or some portion of their various journeys.

Large numbers of persons who take passage on both outbound and inbound Market Street cars of complainant at various points on Market Street, paying cash fares, use the Market Street cars only for transportation to their respective destinations. This class of traffic, involving as it does only a short haul, is quite profitable. Complainant charges and receives the same fare for carrying pas-
144 sengers either a long or short distance within said City and County, and the profit derived from carrying passengers a short distance is much greater than that derived from carrying them greater distances. This Market Street patronage is therefore of great and peculiar value to complainant. The average number of such passengers carried by complainant daily on its Market Street lines is about —, and for their carriage complainant receives daily about the sum of $—, a very large percentage of which is profit. If the proposed lines should be constructed by the defendant City and County the cars operated thereon, being close to the sidewalks and easy of access, would take from the complainant a large proportion of such business, but complainant cannot state the exact or approximate amount of such loss. On the other hand, the cars of complainant would be more difficult of access on account of conditions hereinabove set forth, and passengers boarding and alighting from same would be in constant danger from the cars of the defendant City and County operated on the outer tracks. This condition would tend to divert and would divert a large proportion of such passengers from the lines of complainant to those of the defendant City and County. The complainant is informed and believes and therefore alleges, that if such lines should be constructed and operated as proposed much more than half of the patronage above described would be permanently lost to complainant and its Market Street business practically destroyed.

On account of the conditions hereinabove set forth the carrying capacity of Market Street has been and is now being greatly exceeded, and if the additional lines hereinabove described should be constructed and operated by the defendant City and County of San Francisco the burden placed upon the carrying capacity of Market Street would be greatly increased, which would result in
145 great and irreparable injury to the complainant and amount to confiscation of its property.

XXXII.

If the defendant City and County of San Francisco should lay and construct railroad tracks on Market Street as proposed it would be necessary for said City and County to cut the rails of the tracks of complainant on the following lines of complainant and to cross the tracks of said lines, to-wit: Castro Street tracks at their intersection with Market Street; Market Street tracks at the intersection of Church and Market streets; Valencia Street tracks at the intersection of Valencia and Market Streets; Haight Street tracks at the intersection of Haight and Market Streets; 12th street tracks at the intersection of 12th and Market Streets; Market Street tracks at the intersection of Van Ness Avenue and Market Street; 10th and Polk Streets tracks at the intersection of Polk and Market Streets and at the intersection of 10th and Market Streets; Hayes Street tracks at the intersection of Hayes and Market Streets; 9th and Larkin Streets tracks at the intersection of Market and Larkin Streets and Market and 9th Streets; 8th Street tracks at the intersection of 8th and Market Streets; 6th and Taylor Streets tracks at the intersection of Market and Taylor Streets, and at the intersection of 6th and Market Streets; 5th Street tracks at the intersection of 5th and Market Streets; 4th and Ellis Street tracks at the intersection of Ellis and Market Streets and at the intersection of Market and 4th Streets; 3rd and Kearny Street tracks at the intersection of Kearny and Market Streets and at the intersection of Market and Third Streets.

XXXIII.

Your orator has never consented, and does not now consent
146 to the building, construction, running or operation of said Municipal Street Railway or Railways so to be built, constructed, run and operated by said defendants as aforesaid, nor to the cutting of the tracks or rails of your orator at the points and intersections hereinabove set forth, or any of them.

XXXIV.

Neither the defendants City and County of San Francisco, the Board of Supervisors, nor any of said defendants, have undertaken to institute any proceedings for the purpose of acquiring the properties of your orator United Railroads of San Francisco, as hereinbefore described and set forth, nor any part thereof, nor has the said defendant City and County of San Francisco, through its said Board of Supervisors or otherwise, instituted any proceeding or undertaking to acquire any street railroad of your orator or of any of its predecessors as required by Article XII, Section 2, of the Charter of the City and County of San Francisco, approved by the Legislature of the State of California January 26th, 1899, or any of the amendments thereof approved by said Legislature of the State of California

on February 5th, 1903, November 23rd, 1907, February 17th, 1911, March 28th, 1913, or April 1st, 1915. Said Section 2 of said Charter reads as follows:

"Sec. 2. Before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities, the Board of Supervisors must solicit and consider offers for the sale to the City and County of existing utilities, in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

and the said defendant City and County of San Francisco, through its said Board of Supervisors or otherwise, has not heretofore, and does not now, contemplate the acquisition of any of the properties or franchises of your orator, United Railroads of San Fran-
147 cisco.

The defendant City and County of San Francisco, through its said Board of Supervisors or otherwise, has not made, nor has it offered to make, any arrangement, lease or contract with your orator United Railroads of San Francisco for permission to use the track or tracks of your orator from the intersection of Van Ness Avenue and Market Street along Market Street to the intersection of Church and Market Streets, thence along Church Street to 16th Street, nor from Market and 17th Streets along Market Street to Kearny Street; nor have said defendants nor has any of them made, nor have they nor has any of them offered to make, any arrangement, lease or contract with your orator United Railroads of San Francisco for permission to cut the tracks or rails of your orator on Market Street, or at the points of intersection hereinabove mentioned, or any of them; nor have said defendants nor has any of them made, nor have they nor has any of them offered to make, any arrangement, lease or contract with your orator for permission to connect the tracks of the said Municipal Railway line on Church Street with the tracks of your orator at 16th and Church Streets; nor have said defendants nor has any of them made, nor have they nor has any of them offered to make, any compensation to your orator United Railroads of San Francisco for connecting the said Municipal Railway tracks on Church Street with the tracks of your orator at Church and 16th Streets or for the crossing of the tracks of your orator by the tracks of said Municipal Railway or railways, at any of the points or intersections hereinabove mentioned.

XXXV.

If said defendants build and construct said Municipal Railway or railways outside of the tracks and rails of your orator on
148 Church Street from 16th to Market Street, thence crossing the tracks of your orator at Market Street, thence along Market Street and outside the rails and tracks of your orator on Market Street to Van Ness Avenue, thence crossing the tracks and rails of your orator at Van Ness Avenue and connecting with the rails and tracks of the Municipal Railway on Van Ness Avenue, or if said

defendants build and construct said Municipal Railway outside of the tracks and rails of your orator on Market Street from 17th Street to and across Third Street, as they by said ordinance threaten to do, there will then be constructed and laid and running close to and parallel with one another four tracks of railway on said Church Street between 16th Street and Market Streets and on Market Street between 16th Street and Van Ness Avenue and on Market Street from 17th Street to and across Third Street; and if said defendants operate the cars of said Municipal Railway on their said tracks so constructed as aforesaid the same conditions will prevail so far as the difficulty and danger of entering and leaving cars operated on the center tracks is concerned as now prevail on Market Street between Geary Street and the Embarcadero, as above described, and said cars will blanket the cars of your orator operated on Church Street from 16th to Market Street and will blanket the cars of your orator on Market Street from Church Street to Van Ness Avenue, and will blanket the cars of your orator on Market Street from 17th Street to and across Third Street, and will interfere with and cause great danger to passengers desiring to board and leave the cars of your orator on said streets, and will prevent your orator from enjoying full use of the said franchises on said streets, granted to it as herein set forth, and will impede and delay the progress of its said cars, cause greatly increased and continuous expense of
149 operation, and otherwise greatly interfere with the operation of your orator's said cars over said streets and the full exercise and enjoyment of said franchises. And in this connection your orator alleges that the street railway lines operated by it over and along Market Street from 17th Street to and across Third Street and over and along Valencia Street from Market Street to Mission Street, and over and along Haight Street from Market Street to and beyond Stanyan Street, continuously carry a large number of passengers from what is known as the Mission District in said City and County and the Western Addition and Sunset District in said City and County to different points on Market Street, to the Ferry at the foot of Market Street, and to other points throughout said City and County of San Francisco. Said interference in the enjoyment of the said franchises so granted to your orator as aforesaid and the blanketing of its said cars operated over said streets as aforesaid, and the interference with the boarding and the alighting of passengers from the cars of your orator on said streets as aforesaid, will cause your orator a large increase in expense and loss of income from said lines and from the operation, use and enjoyment of its said franchises, the amount of which it is impossible to determine, but which will be greatly in excess of $3,000; that said loss is a continuing one, and your orator will continue to suffer therefrom indefinitely unless said defendants and each of them are restrained and enjoined by this Court from doing the wrongful acts hereinabove set forth.

XXXVI.

Said defendants and each of them will, unless enjoined and restrained by your Honors, operate said cars over said Church

150 Street and along said Market Street to Van Ness Avenue, crossing the tracks of your orator at the points and intersections hereinbefore set forth, and over and along Market Street from 17th Street to and across Third Street and crossing the tracks of your orator at the points and intersections hereinabove set forth, without regard to the time schedules and headways established by your orator for the operation of its cars over said streets as aforesaid; but, on the contrary, will operate their said cars according to their own time schedules and headways, thus seriously interfering with and disarranging the time schedules and headway of the cars of your orator operating over said streets as aforesaid, and impeding and delaying the operation of your orator's cars on said streets, and causing serious congestion of cars and traffic generally, particularly at street and track crossings, and rendering it impracticable for your orator to operate its said cars according to its established time schedules and headways under its said franchises, and seriously interfering with the service which your orator desires to give to the public of the City and County of San Francisco and with the proper and regular service on its said Railway. The obstruction, congestion and delay caused by such action on the part of said defendants will cause your orator's operating expenses of its said cars operating on said streets as aforesaid to be largely increased.

XXXVII.

Your orator, as the successor of the Market Street Railway Company and as the successor of other street railway companies theretofore owning and operating street railways in the City and County of San Francisco and in the County of San Mateo acquired by your orator, did, on or about the 7th day of June, 1902, make pro-

151 vision for the purchase, assignment and exchange of the mortgage debts, if any, existing of the Market Street Railway Company and of the other street railway companies so acquired, and did in exchange therefor duly and legally issue its own bonds aggregating the sum of $25,409,000, and did include, among other things, as security for the payment and redemption of said bonds issued by your orator, all of the rights, privileges, immunities and franchises which your orator possesses, claims, owns or is entitled to, including the franchises granted to your orator's predecessors in interest as hereinabove alleged and particularly set forth. A part of the security for each and every outstanding bond of your orator is the franchises owned by your orator as successor in interest to the Market Street Railway Company of San Francisco and Market Street Railway Company, embracing the lines of street railway along Market Street, commencing at the City Front on Market Street, thence along Market Street to 17th Street, and along Church Street from Market Street to 16th Street, all in said City and County of San Francisco.

XXXVIII.

There are at present outstanding and in the hands of third parties, purchased in good faith and for value received, said bonds of your

orator and of your orator's predecessors in interest, amounting in the aggregate to a sum upwards of $25,409,000. The proceeds and moneys derived from the sale of said outstanding bonds have been used by your orator or its predecessors in interest for the purpose, among other things, of purchasing the properties and franchises of the Market Street Railway Company, one of the predecessors in interest of your orator, and of other railway companies so acquired by your orator, as above set forth, and for the construction
152 and equipment of the railroads of your orator in the City and County of San Francisco and the County of San Mateo.

XXXIX.

Unless restrained and enjoined from so doing, as herein prayed, the defendants and respondents herein threaten to and will proceed to construct and operate a street railroad in said City and County of San Francisco from Market and 17th Streets along Market Street to and across Third Street, crossing the tracks of your orator at the points and intersections hereinabove set forth, and from the intersection of Van Ness Avenue and Market Street, crossing the tracks of your orator at Van Ness Avenue and Market Street, thence along Market Street to the intersection of Market and Church Streets, crossing the tracks of your orator at Market and Church Streets and at the points and intersections hereinabove set forth, and will cut the tracks and rails of your orator at the intersections hereinabove set forth so as to permit the tracks of said Municipal Street Railway lines to cross the tracks of your orator laid and constructed upon said streets as aforesaid.

Unless enjoined as herein prayed, the construction of said tracks of said Municipal Street Railway as aforesaid, and the operation of said proposed street railroad by the defendant, City and County of San Francisco, along, over and across the tracks of your orator from the intersection of Van Ness Avenue and Market Street, along Market Street to the intersection of Church and Market Streets, and along Church Street to 16th Street, and along Market Street from 17th street to and across Third Street, will be carried into effect and will cause continued and irreparable damage to your orator,
153 and will occasion a constantly recurring grievance and injury against which your orator is without recourse except by the intervention of this Honorable Court of equity by process of injunction.

Your orator has no plain, speedy or adequate remedy at law, and irreparable loss and damage will result to your orator unless a temporary restraining order is granted herein.

XL.

Unless enjoined as herein prayed, the threatened action of said defendants City and County of San Francisco and its officers, defendants and respondents herein, their agents and representatives, in the proposed construction and operation of the street railroad as

aforesaid, will depreciate the value of your orator's property, will decrease the value of its bonds, will impair the obligation of the contract entered into by the State of California through the authority delegated by it to the City and County of San Francisco in the grant by it to your orator under franchises numbered 1514, 1676 and 2858 (herein referred to and marked "Exhibit A," "Exhibit B" and "Exhibit D," respectively), and will deprive complainant of the rights secured to it by Art. I, Sec. 10, of the Constitution of the United States, and will constitute a taking of the property of your orator without due process of law and in violation of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

XLI.

The Market Street Railway Company of San Francisco and the Market Street Railway Company and your orator, United Railroads of San Francisco, accepted the franchises, right of way and privileges granted under Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), in good faith, relying upon their contracts with the City and County of San Francisco and the State of California, and your orator, as the successor in interest of each of the
154 above named companies and persons acquired said franchises and each of them, and accepted their and each of their terms, conditions and restrictions in like good faith, and particularly your orator and its predecessors in interest did, in the acceptance of said franchises, rights of way and privileges, and in the building of said street railways thereunder, expend large sums of money relying upon the good faith of the said State of California and the said City and County of San Francisco in the carrying out of their said contracts with your orator and its predecessors in interest, and in particular reliance upon that clause of said contract that two railroad corporations and no more might occupy and use the same street or tracks with your orator for a street railway for a distance of five blocks and no more.

After the acquisition by your orator of the franchises, rights of way and privileges herein referred to your orator expended large sums of money in repairs and reconstruction of said tracks and railway, built, constructed and operated under said franchises as aforesaid, in reliance upon its said contract with said State of California and the City and County of San Francisco, and in particular reliance upon the clause of said contracts that two railroad corporations and no more might occupy and use the same street or tracks for a street railway for a distance of five blocks and no more.

The defendant City and County of San Francisco has already acquired the track for its Municipal Railway and is now operating for more than five blocks on Market Street, to-wit, on Market Street from Kearny Street to the Embarcadero in said City and County, and is now operating by electricity by means of the overhead
155 trolley system cars over said tracks for more than five blocks on Market Street, to-wit, from said Kearny Street to said Embarcadero.

Said defendant City and County of San Francisco is now operating a line of street railway on Van Ness Avenue connecting with Geary Street in said City and County, and if the proposed line of railway is built along Church Street to Market Street, thence along Market Street to Van Ness Avenue, there connecting with the tracks of said defendant City and County of San Francisco on Van Ness Avenue, the said defendant City and County of San Francisco can, and as your orator is informed and believes and therefore alleges does threaten to, run through cars from the terminus of the said Church Street line at Church and 30th Streets, thence along Church to Market Street, thence along Market to Van Ness Avenue, thence along Van Ness Avenue to Geary Street, thence along Geary to Market and Kearny Streets, and thence along Market Street to the Embarcadero, thus making said railway line and route one continuous line which already includes more than five blocks on Market Street but which, with the blocks added between Van Ness Avenue and Church Street, would make the said distance upwards of fifteen blocks. The distance on Market Street between 17th Street and the Embarcadero is more than five blocks, to-wit, upwards of twenty-six blocks.

XLII.

The defendant and respondent, City and County of San Francisco, in now attempting to construct and operate its street railway as hereinabove set forth, is seeking to and will impair the obligation of the contract of your orator and each of the above named railway corporations with the State of California and said City and County of San Francisco, and is likewise seeking to and will impair the
156 obligation of the contracts of your orator and each of the above named railway corporations with the State of California and the City and County of San Francisco by becoming a competitor in the business of owning and operating a street railway along the streets as hereinabove set forth.

XLIII.

When said Market Street Railway Company of San Francisco, Market Street Railway Company and your orator, United Railroads of San Francisco, accepted the rights, privileges and franchises granted by said Orders Nos. 1514, 1676 and 2858 (Exhibits A, B and D herein), they and each of them did so relying upon their and each of their contracts with said City and County of San Francisco and said State of California that not more than two lines of railway would be permitted to use the same street for a distance of five blocks on any of the streets named in said franchises or orders, and particularly from the intersection of Van Ness Avenue and Market Street, thence along Market Street to Church Street, thence along Church Street to 16th Street, and from Market and 17th Street, thence along Market Street to the Embarcadero; and furthermore did so in the belief that the City and County of San Francisco would

not itself become a competitor in the railway business along any of the streets named in said orders or franchises and particularly along said streets aforesaid; and the City and County of San Francisco and the State of California, acting through it, well knew that the said predecessors in interest of your orator, in expending moneys for the construction and equipment of said railroads, would not, nor would your orator, have expended money in the construction and equipment of said railroads if the said predecessors in interest of your orator and your orator had believed that the City and County
157 of San Francisco would have undertaken to construct and operate a railroad along any of the streets named in the orders or franchises herein referred to, and particularly from the intersection of Van Ness Avenue and Market Street, thence along Market Street to Church and Market Streets, thence along Church Street to 16th Street, and from Market and 17th Streets along Market Street to the Embarcadero, and become a competitor of your orator in the street railway business along said streets as aforesaid.

XLIV.

Your orator further alleges that the amount in controversy in this suit largely exceeds the sum and value of $3,000, exclusive of interest and costs, and that the damage to the property of your orator, unless the defendants and respondents and each of them are enjoined as herein prayed, will be greatly in excess of $3,000, with interest and costs.

Forasmuch, therefore, as your orator is remediless in the premises and cannot have adequate relief except in a court of equity, and to the end that said City and County of San Francisco, a Municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a Municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph L. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said
158 City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a Municipal corporation, who are made defendants and respondents to this, your orator's amended bill of complaint, may, if they can, show why your orator should not have the relief hereby prayed, and to the best and utmost of their knowl-

edge, remembrance, information and belief full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged, but not under oath, their and each of their answers under oath being expressly hereby severally waived; and that the defendants and respondents, and each and every one of them, and their and each of their legal representatives, agents, employees, and servants, or any or either of them, be immediately enjoined and restrained by the decree of this Honorable Court, until the further order of this Court, from constructing its said Municipal Street Railway line on Market Street from 17th Street to and across Third Street and from the intersection of Van Ness Avenue and Market Streets, thence along Market Street to the intersection of Church and Market streets, thence along Church Street to 16th Street, and from cutting any of the tracks or rails of your orator at the intersection of Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, Market and Polk Streets, Market Street
159 and Van Ness Avenue, at Market and Church Streets, and at Church and 16th Streets; and be likewise enjoined and restrained from carrying out or consummating or taking any steps or measures to carry out or consummate the surveying, constructing for the survey, building, owning, or operating or constructing any line or lines of street railroad in the City and County of San Francisco over and along Market Street commencing at the intersection of Market and 17th Streets, thence along Market Street to and across Third Streets, or commencing at the intersection of Market Street and Van Ness Avenue, thence along Market Street to the intersection of Market and Church Streets, thence along Church Street to 16th Street, and from cutting or crossing any of the tracks or rails of your orator at 16th and Church Streets or at Market and Church Streets, or at Market Street and Van Ness Avenue, or at Market and Tenth Streets, Market and Ninth Streets, Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, and Market and Polk Streets; and that upon the final hearing thereof such injunction be made permanent and perpetual; and that it be decreed that said proposed construction, ownership, or operation of the line or lines of street railroad over and along Market Street commencing at the intersection of Market and 17th Streets, thence along Market Street to and across Third Street, and also commencing at the intersection of Market Street and Van Ness Avenue, thence along Market Street to the intersection of Market and Church Streets, thence along Church Street to 16th Street, and the cutting of the tracks and rails of your orator at 16th and Church Streets, Market and Church Streets, Market and Van Ness Avenue, and at Market and Tenth Streets Market and Ninth Streets,
160 Market and Sixth Streets, Market and Fourth Streets, Market and Third Streets, and at Market and Kearny Streets, Market and Ellis Streets, Market and Taylor Streets, Market and Larkin Streets, Market and Polk Streets, and the connecting of the tracks of

said Municipal Railway at 16th and Church Streets with the tracks of your orator on said streets by the defendant City and County of San Francisco and each and all of the defendants and respondents herein, their legal representatives, officers, servants, employees and agents, are, and each of them is, unauthorized and illegal; and for such other, further and additional relief in the premises as equity may require and to your Honors may seem meet; and for costs;

May it please your Honors to grant unto your orator, United Railroads of San Francisco, a writ of injunction conformable to the prayer of this Bill, and also a writ of subpœna of the United States of America directed to the said defendants and respondents, and each of them, commanding them, and each of them, on a certain day therein named and under a certain penalty, to appear and answer unto this amended bill of complaint, and to abide by and perform such order and decree in the premises as to the Court may seem meet and proper; and your orator will ever pray, etc.

GARRET W. McENERNEY,
WM. M. ABBOTT, AND
WM. M. CANNON,
Solicitors for the Above-named Complainant.

161 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Jesse W. Lilienthal, being first duly sworn according to law, deposes and says: That he is an officer, to-wit, President, of the complainant United Railroads of San Francisco, named in the foregoing amended bill of complaint, and makes this affidavit as such President on behalf of said complainant corporation; that he has read the foregoing amended bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated upon information or belief, and as to those matters he believes it to be true.

JESSE W. LILIENTHAL.

Subscribed and sworn to before me this 16th day of August, A. D. 1916.

[NOTARIAL SEAL.] CHARLES E. REITH,
Notary Public in and for the City and County of San Francisco, State of California.

162 EXHIBIT A.

Order No. 1514.

Granting to the Market Street Railway Company of San Francisco Certain Rights and Privileges Therein Specified.

The People of the City and county of San Francisco, do ordain as follows:

Section 1. The right is hereby granted to the Market Street Railway Company of San Francisco, its successors and assigns, to construct, lay down, maintain and operate, for the term of fifty years, from and after the passage of this order, a single or double track street railroad, with all the necessary switches and turnouts, along and upon the following streets in the city and county of San Francisco, to wit:

First. Commencing at the City Front, on Market street; thence along Market Street to Seventeenth Street.

Second. Commencing at the intersection of Market and Post Streets; thence along Post street to Dupont street; thence along Dupont street to Market street, by and with the consent of the Potrero and Bay View Railroad Company, and not otherwise.

Third. Commencing at the intersection of Market and Fifth streets; thence along Fifth street to Bluxome street; thence along Bluxome street to the east line of Fourth street, by and with the consent of the Potrero and Bay View Railroad Company, and not otherwise.

Fourth. Commencing at the intersection of Market and McAllister streets; thence along McAllister street to a point within four hundred feet west of the west line of Devisadero street, with switches and tracks running on Fillmore Street to the car-house of said Company, situated on the southwest corner of Fillmore and Turk streets.

Fifth. Commencing at the intersection of Market and Hayes streets; thence along Hayes street to Laguna street; thence along Laguna street to McAllister street.

Sixth. Commencing at the intersection of Market and Haight streets; thence along Haight street to Golden Gate Park; and

Seventh. Commencing at the intersection of Market and Valencia streets; thence along Valencia street to Mission street.

163 Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said Company, upon such terms, conditions and restrictions as are now imposed, or may hereafter be imposed, by the laws of the State of California, and especially the terms, conditions and restrictions imposed by the 498th and 500th and 502d Sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said Company with all of the provisions of said laws is hereby required.

Section 3. It shall be lawful for said Railway Company, its successors and assigns, at its or their option, to propel cars over said railways by the use of horses or mules, or wire ropes running under said streets, and moved by stationary steam-engines; provided that it shall be lawful for said Company, its successors or assigns, to propel cars over said railway on Market street, from the intersection of Valencia street to Seventeenth street, by the use of steam dummies, until otherwise ordered by the Board of Supervisors of the city and county of San Francisco.

Section 4. All railway tracks which have been laid down, and are now being laid down, and are now being operated by said Railway Company upon any of said streets under grants heretofore made by the State of California, or by the people of the city and county of San Francisco; and all tracks which have been laid down on any of said streets by the Potrero and Bay View Railroad Company (said Company assenting hereto) shall be taken, considered and accepted as having been so laid down under and by virtue of the rights hereinbefore granted, and as having been so laid down and constructed in strict compliance with the provisions of this order and the laws aforesaid of the State of California.

164 Section 5. It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the civil code of this State. This section shall apply to persons and companies, as well as corporations.

Section 6. Whenever said Railway Company shall elect, as hereinbefore provided, to operate said railways, or either or any of them, in whole or in part, by the use of an endless wire rope or cable and stationary steam engines, it shall be lawful for said Company to make all needful and convenient trenches and excavations in any of said streets under which it proposes to place such rope or cable, and to place in such trenches and excavations all needful and convenient machinery for operating said railways in the manner and by the means aforesaid. It shall also be lawful for said Railway Company to erect and maintain, at convenient and suitable points long the line of the streets under which such wire cables are placed, steam engines and boilers of ample and sufficient power, and to connect the same with said wire cables. All such trenches and excavations shall be beneath the surface of the street, which surface shall be securely supported, so as not to impair the use and enjoyment of said streets by the public. And the framework of all trenches in which wire cables are placed shall be constructed in a substantial and workmanlike manner, and the slot or aperture opening into such trenches shall not exceed three-fourths of an inch in width.

Section 7. It shall not be lawful for said Railway Company, its successors or assigns, to propel its cars over said railways, or either thereof, at a speed exceeding eight miles per hour, and for each violation of this provision said Railway Company, its successors or

165 assigns, as the case may be, shall be subject to a penalty of one hundred dollars, to be recovered, in any Court of competent jurisdiction, at the suit of the people of the city and county of San Francisco, to the use of the General Fund of said city and county.

Section 8. Whenever it shall be necessary for said Railway Company to plank, or pave, or macadamize its railway tracks as provided in the 498th section of the Civil Code of this State, it shall use the same material which is, or may be used, by said city and county in

respect to the remainder of the street, unless otherwise directed or permitted by the Board of Supervisors of said city and county.

Section 9. The rights and privileges hereby granted shall be deemed to be in addition to and in lieu of all other railway franchises, rights and privileges heretofore granted to said Railway Company by the State of California, or the city and county of San Francisco.

Section 10. Said Railway Company shall pay, in quarterly payments, to the city and county of San Francisco, the sum of fifteen dollars per annum as a license tax upon each car used by it, and no greater sum shall be exacted.

Section 11. The rate of fare for each passenger upon the said railroad, shall not exceed the sum of five (5) cents each way, for any distance over either of the lines of the said railroad, between the eastern terminus at the City Front and the western and southern terminus as named herein.

Section 12. Said Railway Company is hereby required to file in the office of the Clerk of the Board of Supervisors of the city and county of San Francisco, an acceptance, in writing, of the provisions of this order, under its corporate seal, signed by its President, and countersigned by its Secretary, and thereupon the provisions
166 of this order shall be taken and deemed to be a contract between said Company and said city and county. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void.

Section 13. This order shall take effect from and after the date of its passage.

In Board of Supervisors.

San Francisco, September 15, 1879.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Foley, Mangels, Talbert, Danforth, Smith Rountree, Farron, Scott, Haight, Gibbs, Brickwedel.

Absent—Supervisor Acheson.

JNO. A. RUSSEL, *Clerk.*

Approved, San Francisco, September 20, 1879.

A. J. BRYANT,

Mayor and ex-Officio President Board of Supervisors.

167 EXHIBIT B.

Order No. 1676.

To amend section one of order No. 1514, granting to the Market Street Railway Company of San Francisco certain rights and privileges therein specified, approved September 20th, 1879.

The People of the City and County of San Francisco, do ordain as follows:

Section 1. Section one of said Order No. 1514 is hereby amended to read as follows:

Section 1. The right is hereby granted to the Market Street Railway Company of San Francisco, its successors and assigns, to construct, lay down, maintain and operate*d*, for the term of fifty years, from and after the passage of this order, a single or double track street railroad, with all the necessary switches and turnouts, along and upon the following streets in the City and County of San Francisco, to wit:

First. Commencing at the City Front, on Market Street; thence along Market Street to Seventeenth street.

Second. Commencing at the intersection of Market and Fifth Streets; thence along Fifth street to Bluxome street; thence along Bluxome street to the east line of Fourth Street, by and with the consent of the Potrero and Bay View Railroad Company, and not otherwise.

Third. Commencing at the intersection of Market and McAllister Streets; thence along McAllister Street to Lott Street; thence southwest to Fulton Street; thence along Fulton street to Stanyan street.

Fourth. Commencing at the intersection of Market and Hayes Streets; thence along Hayes street to the westerly line of Stanyan street.

Fifth. Commencing at the intersection of Market and Haight streets; thence along Haight street to Golden Gate Park; and

Sixth. Commencing at the intersection of Market and Valencia streets; thence along Valencia street to Mission street.

168 Section 2. This Order shall be in force from and after its passage.

In Board of Supervisors.

San Francisco, May 29, 1882.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Bodfish, McKew, Shirley, Carmany, Molineux, Torrens, Bradford, Fisher, Merrill, Parrish, Kennedy.

Absent—Supervisor Russ.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, June 5, 1882.

M. C. BLAKE,
Mayor and ex-Officio President Board of Supervisors.

169 EXHIBIT C.

No. —.

STATE OF CALIFORNIA,
Department of State:

I, C. F. Curry, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of

Articles of Consolidation, Amalgamation and of Incorporation of Market Street Cable Railway Company, et al., with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 24th day of August, A. D. 1906.

[SEAL.] C. F. CURRY,
Secretary of State.
By J. HAND, *Deputy.*

170 *Articles of Consolidation, Amalgamation, and Incorporation of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, City Railroad Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and Ferries and Cliff House Railway Company.*

Articles of consolidation, amalgamation and incorporation made and executed on the 13th day of October, A. D. 1893, by and between the Market Street Cable Railway Company, party of the first part; the Market Street and Fairmount Railway Company, party of the second part; the City Railroad Company, party of the third part; the Potrero & Bay View Railroad Company, party of the fourth part; the Southern Heights and Visitacion Railway Company, party of the fifth part; the Park and Ocean Railroad Company, party of the sixth part; the Ocean Beach Railway Company, party of the seventh part; the Central Railroad Company, party of the eighth part; the Omnibus Cable Company, party of the ninth part; the North Beach and Mission Railway Company, party of the tenth part; and the Ferries and Cliff House Railway Company, party of the eleventh part; all of said parties being railroad corporations duly organized and existing under the laws of the State of California, and having their respective principal places of business in the City and County of San Francisco, in the State of California.

Witnesseth: That whereas, the said party of the first part, the Market Street Cable Railway Company, is the owner of certain street railways in the streets and within the corporate limits of the City and County of San Francisco, in said State, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street to Seventeenth street; also, commencing at the intersection or junction of Market and Fifth streets, there connecting with said Market street line; thence along Fifth street to Bluxome street; thence along Bluxome street to the east line of Fourth street; and thence through private property to Townsend street; also, commencing at the intersection or junction of Market and McAllister streets; there

connecting with said Market street line; thence along McAllister street to Lott street; thence southwest to Fulton street; thence along Fulton street and D street to the westerly line of Seventh avenue; also, commencing at the intersection or junction of Market and Hayes streets, there connecting with said Market street line; thence along Hayes street to Stanyan street; also, commencing at the intersection or junc-
171 tion of Market and Haight streets, there connecting with said Market street line; thence along Haight street to Golden Gate Park; also, commencing at the intersection or junction *or* Market and Valencia streets; there connecting with said Market street line; thence along Valencia street to Mission street; the total length of said railways being, as estimated, thirteen miles; and also of all rights, franchises and privileges granted in respect of said railways;

And the said party of the first part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco more particularly described as follows, to-wit: Commencing at the intersection or junction of D street and Seventh avenue; thence along D street to the westerly line of Nineteenth avenue; also commencing at the intersection or junction of Hayes and Stanyan streets; thence along Stanyan street to Fulton street; also commencing at the intersection or junction of Church and Thirtieth streets; thence along Church street and across Market street to the intersection or junction of Church street with Hermann or Kate street; thence westerly along Hermann or Kate street to its intersection with Fillmore street; also, commencing at the intersection of Church and Ridley streets; thence along Ridley street to its intersection with Fillmore street; thence along Fillmore street to the northerly end thereof; also, commencing at the intersection or junction of Illinois and Sixteenth streets; thence along Sixteenth street to Market street; thence along Market street to Seventeenth street; thence along Seventeenth street to Ashbury street; thence along Ashbury street to its junction with Clayton street or the southerly extension thereof; thence along such southerly extension of Clayton street and Clayton street to the northerly line of the San Miguel Rancho; thence continuing northerly either along Clayton street or through and across private property to Carl streets; thence across Carl street and through and across private property to the intersection of Cole street with Frederick street; also, commencing at the intersection of Turk and Fillmore streets; thence along Turk street to and upon and across First avenue to B street; thence along B street to Nineteenth avenue; thence along Nineteenth avenue to and upon and across D street to Golden Gate Park; also, commencing at the intersection of Castro and Seventeenth streets, there connecting with the tracks of the Market Street and Fairmount Railway Company; thence along Castro street to Ridley street; thence along Ridley street to Devisadero street; thence along Devisadero street to the northerly end thereof; also, curving from Devisadero street into and along O'Farrell street to a proposed car house on O'Farrell street, between Devisadero and Scott streets; also, com-

mencing at the intersection or junction of Potrero avenue and Twenty-second street; thence along Twenty-second street to Chattanooga street; thence along Chattanooga street to Twenty-fourth street; thence along Twenty-fourth street to Hoffman avenue; also, commencing at the intersection of Twenty-second and Dolores streets; thence along Dolores street to Twenty-fourth street; thence along Twenty-fourth street to and across Chattanooga street; also,
172 commencing at the intersection of Twenty-fourth and Noe streets; thence along Noe street to Jersey street; thence curving into and along Jersey street to the car house of said Market Street Cable Railway Company on Jersey street, between Noe and Castro streets; also, commencing at the intersection or junction of Market and Seventh streets, there connecting with the tracks of said Market Street Cable Railway Company on Market street; thence along Seventh street to King street; also, commencing at the intersection of Napa and Kentucky streets, there connecting with the tracks of the Southern Heights and Visitacion Railway Company; thence along Napa street to Maryland street; the total length of said last-named railways being, as estimated, nineteen miles, only a portion of which has been constructed:

And whereas, the said party of the second part, the Market Street and Fairmount Railway Company, is the owner of a street railway in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing on Castro street at or near its intersection or junction with Market street; thence along Castro street to Twenty-sixth street; the length of said railway being, as estimated, one mile; and also of all rights, franchises and privileges granted in respect of said railway:

And whereas, the said party of the third part, the City Railroad Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Mission street; thence along Mission street and Mission street road to China avenue; also, commencing at the intersection or junction of Mission and Twenty-ninth streets, there connecting with said Mission street line; thence along Twenty-ninth street to Noe street; also, commencing at the intersection of Mission and Fifth streets; thence along Fifth street to Market street; thence along Market street to Dupont street, or Grant avenue; thence along Dupont street, or Grant avenue, to Sutter street; thence along Sutter street to Market street; thence along Market street to the city front and ferry landings; also, commencing at the intersection of Sutter street and Dupont street, or Grant avenue; thence along Dupont street, or Grant avenue, to Bush street; the total length of said railways being as estimated eight miles, and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the third part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, more par-

ticularly described as follows, to-wit: Commencing at the intersection or junction of China avenue and Mission street or Mission street road; thence in a southerly and southwesterly direction along Mission street and Mission street road and Telegraph or New County road to the southerly boundary line of said city and county; also, commencing at the intersection of Mission and Fourteenth streets,
173 there connecting with the tracks of said City Railroad Company on Mission street; thence along Mission and West Mission streets to Potter street; thence along Potter street to Market street; thence across Market street to Page street; thence along Page street to Masonic avenue; thence along Masonic avenue to Frederick street; thence along Frederick street to the westerly line of First avenue; also, commencing on West Mission street at a point where the line of Mission street projected northerly would intersect said street; thence northerly across Brady and Market streets to Page street; also, commencing at the intersection or junction of Mission street and Richland avenue; thence along Richland avenue to Andover avenue; thence along Andover avenue to East Park street; thence along East Park street, Holly Park avenue and West Park street to Holly street, and along Holly street from Mission street to Richland avenue; also, commencing at the intersection or junction of Mission street and Cortland avenue; thence along Cortland avenue to Butler street; thence along Butler street to Blaine street; thence along Blaine street to North avenue; thence along North avenue to Cortland avenue, and along California avenue from Cortland avenue to Powell avenue; thence along Powell avenue to Mission street; also along Virginia avenue from California avenue to Mission street; the total length of said last-named railways being as estimated seven miles, only a portion of which has been constructed.

And whereas, the said party of the fourth part, the Potrero and Bay View Railroad Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows; to-wit: Commencing at the intersection or junction of Montgomery and Post streets; thence along Post street to Dupont street or Grant avenue; thence along Dupont street, or Grant avenue to Market street; thence along Market street to Fifth street; also, commencing at the intersection of Fourth and Townsend streets; thence along Fourth street to Berry street; the total length of said railways being as estimated one mile, and also of all rights, franchises and privileges granted in respect of said railways:

And whereas, the said party of the fifth part, the Southern Heights and Visitacion Railway Company, is the owner of a street railway in the streets and within the corporate limits of said City and County of San Francisco described as follows, to-wit: Commencing at the intersection of Fourth and Berry streets; thence along Fourth street to Kentucky street; thence along Kentucky street to Sonoma street; the length of said railway being as estimated two miles, and also of all rights, franchises and privileges granted in respect of said railway:

And the said party of the fifth part is also the owner of certain rights, franchises and privileges for the construction, maintenance

and operation of street railways within the corporate limits of said City and County of San Francisco described as follows, to-wit: Commencing at the intersection of Kentucky and Sonoma streets; thence along Kentucky street to and across Tulare street, Islais Creek channel and Islais street to Railroad avenue; thence along Rail-
174 road avenue to Sixteenth avenue; also commencing at the intersection of Mission and Sixth streets; thence along Sixth street to Brannan street; thence along Brannan street to Eighth street; thence along Eighth street and across Townsend and Channel streets to Kansas street; thence along Kansas street to Santa Clara street; thence along Santa Clara street to Connecticut street; thence along Connecticut street to Solano street; thence along Solano street to Kentucky street, there connecting with the line of railway above described on Kentucky street; the total length of said last-named railways being as estimated four miles, only a portion of which has been constructed:

And whereas, the said party of the sixth part, the Park and Ocean Railroad Company, is the owner of a street railway in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing on Stanyan street at its intersection or junction with Haight street; thence along Stanyan street to its intersection with Frederick street; also curving from Stanyan street to the right across Golden Gate Park and Willard street, and through private property and across First avenue to H street; thence westerly along H street to the vicinity of the Great Highway; thence curving northerly and deflecting easterly and across Golden Gate Park to the intersection of D street and Forty-ninth avenue; thence along Forty-ninth avenue to B street; also curving into Waller street from Stanyan street; thence along Waller street to Shrader street; the total length of said railway being as estimated five miles; and also of all rights, franchises and privileges granted in respect of said railway:

And whereas, the said party of the seventh part, the Ocean Beach Railway Company, is the owner of certain rights, franchises and privileges for the construction, maintenance and operation of a street railway in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection or junction of Fell and Stanyan streets; thence along Stanyan street to Fulton street; thence along Fulton street to First avenue; thence along First avenue to Point Lobos avenue; thence along Point Lobos avenue to its junction with the road known as Point Lobos road or Cliff House road; thence along said last-named road to the westerly end thereof; the length of said railway being, as estimated, four miles, only a portion of which has been constructed:

And whereas, the said party of the eighth part, the Central Railroad Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Jackson street; thence along Jackson street to Sansome

street; thence along Sansome street to Bush street; thence along Bush street to Kearny street; thence along Kearny street to Post street; thence along Post street to Stockton street; thence along Stockton street to Geary street, thence along Geary street to Taylor street; thence along Taylor street to Market street; thence across
175 Market street to Sixth street; thence along Sixth street to Brannan street; thence along Brannan street to Eighth street; also, commencing at the intersection of Sansome and Bush streets; thence along Bush street to Market street; thence along Market street to the city front and ferry landings; also, commencing at the intersection of Sansome and Pine streets; thence along Pine street to Market street; also, commencing at the intersection of Sansome and Washington streets; thence along Washington street to East street; also commencing at the intersection of Geary and Powell streets; thence along Powell street to Market street; also commencing at the intersection of Taylor and Turk streets; thence along Turk street to Devisadero street; also commencing at the intersection of Turk and Fillmore streets; thence along Fillmore street to Post street; also commencing at the intersection of Taylor and Turk streets, there connecting with said line above described on Turk street; thence along Turk street to Market street; thence along Market street to Dupont street or Grant avenue; thence along Dupont street or Grant avenue to Post street; the total length of said railways being as estimated seven miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the eighth part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection of Turk and Devisadero streets; thence along Turk street to First avenue; thence along First avenue to D street; thence along D street to Sixth avenue; also commencing at the intersection of Turk and Baker streets; thence along Baker street to Fell street; thence along Fell street to Stanyan street; the total length of said last-named railways being as estimated three miles, only a portion of which has been constructed.

And whereas, the said party of the ninth part, The Omnibus Cable Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Howard street; thence along Howard street to Twenty-sixth street; also commencing at the intersection or junction of Spear and Market streets; thence along Spear street to Bryant street; also commencing at the intersection of Bryant and First streets; thence along First street to Brannan street; thence along Brannan street to Channel street; thence along Channel street to Potrero avenue; thence along Potrero avenue to Yolo street; thence along Yolo street to Nebraska street; thence along Nebraska street to San Bruno road; thence along San Bruno road to Dwight street; also, commencing at the intersection or junction of San Bruno road with

Teneriffe street or Fifteenth avenue; thence along Teneriffe street or Fifteenth avenue to Platte street; also, commencing at the intersection or junction of Potrero avenue and Twenty-third street; thence
176 along Twenty-third street to Howard street; also commencing at the intersection of Nebraska and Yolo streets; thence along Nebraska street to Sonoma street; thence along Sonoma street to Potrero avenue; thence across Potrero avenue to Twenty-fourth street; thence along Twenty-fourth street to Howard street; also commencing on Townsend street near Fourth street; thence along Townsend street to Third street; thence along Third street to Market street; thence along Market street to Montgomery street; thence along Montgomery street to Washington street; thence along Washington street to Stockton street; thence along Stockton street to Union street; thence along Union street to Montgomery avenue; thence along Montgomery avenue to Powell street; thence along Powell street to Beach street; also commencing at the intersection of Pacific and Stockton streets; thence along Pacific street to Montgomery avenue thence along Montgomery avenue to Montgomery street; thence along Montgomery street to Jackson street; thence along Jackson street to Sansome street; thence along Sansome street to Market street; also commencing at the intersection or junction of Market and Montgomery streets; thence along Market street to the city front and ferry landings; also commencing at the intersection of Jackson and Montgomery streets; thence along Jackson street to Stockton street; also commencing at the intersection of Washington and Montgomery streets; thence along Washington street to Sansome street; also commencing at the intersection or junction of Pine and Market streets; thence along Pine street to Sansome street; also commencing at the intersection of Bush and Sansome streets; thence along Bush street to Market street; also commencing at the intersection of Third and Townsend streets; thence along Third street to Berry street; thence along Berry street to Fifth street; thence along Fifth street to Channel street; also commencing at the junction of Market, Post and Montgomery streets; thence across Market street to Second street; thence along Second street to Brannan street; also commencing at the intersection or junction of Post and Market streets; thence along Post street to Leavenworth street; thence along Leavenworth street to Ellis street; thence along Ellis street to Broderick street; thence along Broderick street to Oak street; also commencing at the intersection of Leavenworth and Ellis streets; thence along Leavenworth street to Park avenue; thence along Park avenue to Grove street; thence along Grove street to Polk street; thence along Polk street to Market street; thence across Market street to Tenth street; thence along Tenth street to Channel street; thence along Channel street to Potrero avenue; also commencing at the intersection of Leavenworth and Ellis streets, there connecting with said line above described on Ellis street; thence along Ellis street to its intersection or junction with Market street; also commencing at the intersection or junction of Market and Fell streets, there connecting with said line above described on Polk street and across Market street to Tenth street; thence along Fell street to Franklin street; thence

along Franklin street to Oak street; thence along Oak street to Stanyan street; thence along Stanyan street to Haight street; also commencing at the intersection of Third and Tehama streets;
177 thence along Tehama street to Fourth street; the total length of said railways being as estimated twenty-six miles, and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the ninth part is also the owner of certain rights, franchises, and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows to-wit: Commencing at the intersection of Brannan and Second streets; thence along Second street to Townsend street; thence along Townsend street to Third street; also, commencing at the intersection of Bryant and First streets; thence along Bryant street to Spear street; also, commencing at the intersection of Brannan and First streets; thence along Brannan street to Beale street; thence along Beale street to Bryant street; also commencing at the intersection of Fifth street with the northerly line of Channel street; thence along Fifth street to Illinois street; also, commencing at the intersection of Howard and Twenty-sixth streets; thence along the line of Howard street when opened and extended to Army street; thence along Army street, Precita avenue and Colusa street to San Bruno road; also, commencing at the intersection of Montgomery avenue and Pacific street; thence along Montgomery avenue to Union street; also, commencing at the intersection of Powell and Beach streets; thence along Powell street to Jefferson street and the water front; also commencing at the intersection or junction of Market and Third streets; thence along Market street to Fell street; also commencing at the intersection of Fell and Franklin streets; thence along Fell street to Stanyan street; also commencing at the intersection or junction of Stanyan street with the northerly line of Haight street; thence along Stanyan street to Carl street; thence along Carl street to First avenue; thence along First avenue to and upon H street; also commencing on Hugo street at its intersection with First avenue; thence along Hugo street to Seventh avenue; thence along Seventh avenue to and upon H street; also commencing at the intersection of Hugo street and Seventh avenue; thence along Seventh avenue to I street; thence along I street to Fifteenth avenue; thence along Fifteenth avenue to and upon H street; the total length of said last-named railways being, as estimated, eight miles, only a portion of which has been constructed:

And whereas, the said party of the tenth part, The North Beach and Mission Railway Company, is the owner of certain street railways in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit: Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street to California street; thence along California street to Kearny street; also commencing at the intersection or junction of Market and California streets; thence along Market street to Pine street; thence along Pine street to Battery

street; also commencing at the intersection or junction of Market and Pine streets; thence along Market street to First street; also commencing at the intersection of California and Battery streets;
178 thence along Battery street to Bush street; thence in a direct line and across Market street to its intersection or junction with First street; thence along First street to Folsom street; thence along Folsom street to Stoneman street; also commencing at the intersection of Twenty-sixth and Folsom streets; thence along Twenty-sixth street to Bryant avenue; thence along Bryant avenue to Channel street; thence across Channel street to Bryant street; thence along Bryant street to Second street; thence along Second street to Folsom street; thence along Folsom street to East street; thence along East street to Market street and the city front; also commencing at the junction of Army street and Precita avenue; thence along Army street and Colusa street to Nebraska street and San Bruno avenue; also commencing at the intersection of Fourth and Townsend streets, thence along Fourth street to Market street; thence across Market street to its intersection or junction with Stockton street; thence along Stockton street to Geary street; thence along Geary street to Kearny street; thence along Kearny street to Pacific street; thence along Pacific street to Dupont street; thence along Dupont street to Broadway; thence along Broadway to Powell street; thence along Powell street to Montgomery avenue; thence along Montgomery avenue to Mason street; thence along Mason street to Bay street; also commencing at the intersection of Dupont street and Broadway; thence along Broadway to Montgomery avenue; also commencing at the intersection of Pacific street and Montgomery avenue; thence along Montgomery avenue to Broadway; also commencing at the intersection of Geary and Kearny streets; thence along Kearny street to Market street; thence along Market street to Eighth street; thence along Eighth street to Bryant street; also commencing at the intersection of Fourth and Townsend streets; thence along Townsend street to Third street; the total length of said railways being as estimated fifteen miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the tenth part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection of Montgomery avenue and Broadway; thence along Montgomery avenue to Powell street; also commencing at the intersection of Montgomery avenue and Mason street; thence along Montgomery avenue to Beach street; also commencing at the intersection of Folsom and Steuart streets; thence along Steuart street to Market street; also commencing at the intersection of Fourth and Townsend streets; thence along Fourth street to the southerly end thereof; the total length of said last-named railways being as estimated two miles, only a portion of which has been constructed:

And whereas, the said party of the eleventh part, the Ferries and Cliff House Railway Company, is the owner of certain street railways

in the streets and within the corporate limits of said City and County of San Francisco, more particularly described as follows, to-wit:

179 Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street and curving into Sacramento street; thence along Sacramento street to Walnut street; also commencing on East street at its intersection or junction with Market street; thence along East street to Clay street; thence along Clay street to Larkin street; thence along Larkin street to Sacramento street; also commencing at the intersection of Jackson and Powell streets; thence along Jackson street to Central avenue; also commencing at the intersection of Stockton and Washington streets; thence along Washington street to Steiner street; thence along Steiner street to Jackson street; also commencing at the intersection or junction of Market and Powell streets; thence along Powell street to Jackson street; also commencing at the intersection of Mason and Clay streets, there connecting with said line above described on Clay street; thence along Mason street to Montgomery avenue; thence along Montgomery avenue to Taylor street; thence along Taylor street to Bay street; thence along Bay street to Powell street; also commencing at the intersection of Stockton and Sacramento streets, there connecting with said line above described on Sacramento street; thence along Stockton street to Washington street; also commencing at the intersection of Jackson street and Central avenue; thence along Central avenue to California street; thence along California street to or near the city cemetery; thence northerly along or near Thirty-second avenue to and across Lake street; thence in a northwesterly, westerly, southwesterly and southerly direction near to and following generally the line of the ocean shore to Forty-eighth avenue; thence along Forty-eighth avenue to the Cliff House road; also commencing at the intersection of California street and Seventh avenue, there connecting with said line above described on California street; thence along Seventh avenue to the north line of Golden Gate Park; the total length of said railways being as estimated sixteen miles; and also of all rights, franchises and privileges granted in respect of said railways:

And the said party of the eleventh part is also the owner of certain rights, franchises and privileges for the construction, maintenance and operation of street railways in the streets and within the corporate limits of said City and County of San Francisco, described as follows, to-wit: Commencing at the intersection or junction of Clay and East streets; thence along East street north to Broadway; thence along Broadway to Powell street; thence along Powell street to Vallejo street; thence along Vallejo street to Devisadero street; thence along Devisadero street to Sacramento street; also commencing at the intersection of Sacramento and Walnut streets; thence along Sacramento street to and across First avenue into Lake street; thence along Lake street to Sixth avenue; thence along Sixth avenue to D street; thence along D street to the ocean; also commencing at the intersection or junction of Eddy and Market streets; thence along Eddy street to Devisadero street; also commencing at the intersection of Sacramento and Scott streets; thence

along Scott street to Clay street; thence along Clay street to First avenue; thence along First avenue to California street; also commencing at the intersection of Powell and Bay streets; thence
180 along Bay street to the sea-wall; also commencing at the intersection of Clay and Larkin streets; thence along Clay street to Van Ness avenue; the total length of said last-named railways being as estimated eleven miles, only a portion of which has been constructed.

And whereas, said parties, and all of them, now are, and ever since their organization and incorporation have been, railroad corporations duly and lawfully organized, and existing as such, under the laws of the State of California relating to the formation and existence of railroad corporations.

And whereas, said respective parties believe that a consolidation and amalgamation of their capital stocks, their debts, properties, assets and franchises, will be mutually advantageous.

And whereas, the respective Boards of Directors of said corporations, parties hereto, have agreed upon the consolidation and amalgamation of said corporations, their capital stocks, debts, properties, assets and franchises in the following manner, to-wit:

First. That the said consolidation and amalgamation shall be made at once, and that the name and style of the consolidated and amalgamated corporation shall be Market Street Railway Company. That it shall continue in existence for a period of fifty years from the date of these articles.

Second. That the several capital stocks, debts, properties, assets and franchises held, owned or possessed by each of said corporations shall be vested in said consolidated and amalgamated corporation, The Market Street Railway Company, as fully as the same are now severally held and enjoyed by them respectively, subject, however, to all the conditions, stipulations, contracts, liens, claims and charges thereon, and to all debts and obligations of said respective corporations; and said consolidated and amalgamated corporation shall fully complete, carry out and perform all valid conditions, stipulations and contracts heretofore made by and shall pay and discharge all liens, claims and charges heretofore created or suffered by any of said corporations on their respective properties and shall pay and discharge all valid debts and obligations of every kind, character and description heretofore incurred or assumed by or now existing against any of said corporations.

Third. That the objects, the purposes, the capital stock, the Board of Directors and the principal place of business shall be as expressed in the articles of consolidation, amalgamation and incorporation hereinafter set forth.

Fourth. That the stockholders of each of said corporations, parties hereto, shall have issued to them the number of shares of the capital stock of the consolidated and amalgamated corporation which the Boards of Directors of the corporations, parties hereto, have allotted to such stockholders respectively, upon the surrender of the certificates of stock held by said stockholders in said corporations respectively.

181 And whereas, the holders of more than three-fourths in value of all the capital stock of and issued by each of said respective corporations, parties hereto, have given written consent to the consolidation and amalgamation of said corporations in the manner agreed upon, as aforesaid, by their respective Boards of Directors, and for the purposes expressed in the Articles of Consolidation, Amalgamation and Incorporation following:

Now therefore, know all men by these presents, that the parties hereto, in pursuance of the laws of the State of California, in such cases made and provided, do hereby consolidate and amalgamate their capital stocks, debts, properties, assets and franchises for the uses and purposes aforesaid, and do hereby vest the same in the said consolidated and amalgamated corporation, the Market Street Railway Company, and in pursuance of said consolidation and amalgamation, and in order to more fully carry the same into force and effect, do hereby adopt the following Articles of Consolidation, Amalgamation and Incorporation:

I.

The name of said consolidated and amalgamated corporation shall be Market Street Railway Company.

II.

The objects and purposes of said consolidated and amalgamated corporation are as follows, to-wit:

To purchase, acquire, construct, lease, hire, rent, own, control, operate and maintain street railroads in, along and upon the streets, alleys, highways, roads or lands, and within the corporate limits of the City and County of San Francisco, State of California, and the County of San Mateo, in said State, and to demise and lease the same, or any part thereof, to persons or corporations.

The kinds of railroads to be purchased, acquired, constructed, leased, hired, rented, owned, controlled, operated and maintained by the said consolidated and amalgamated corporation are double or single track street railroads, with all necessary switches, sidetracks, turnouts, turntables and terminal accommodations, and also with all necessary and convenient connections with power houses and car houses, and with all or any of the tracks now laid or which may be hereafter laid under any and all franchises and privileges which have been heretofore granted to or held by any of the constituent corporations of, or may hereafter be granted to this company, or any other company or person or persons, by the governing authorities of said city and county, or said County of San Mateo, or otherwise, said railroads to be operated by animals or by wire cables and stationary engines or by electricity or by locomotive engines, or by all or any and every of such means, or by such other means as science or discovery or invention may provide and the law sanction.

182 The places from and to which said railroads run and are intended to be run are all within the City and County of San Francisco, in the State of California, and the County of San Mateo, in said State, and are as follows:

II.

First. Commencing at the city front at the intersection or junction of Market and East streets; thence along Market street to Seventeenth street; thence along Castro street to its southerly termination; also commencing at the intersection of Castro and Twenty-sixth streets; thence along Twenty-sixth street or by the most practicable route to Diamond street; thence along Diamond street to its southerly termination; also commencing at the intersection or junction of Market and Church streets, there connecting with the tracks of this Company on Market street; thence along Church street to and across Thirtieth street to a proposed car house on Dame street; also commencing at the intersection or junction of Market and Valencia streets, there connecting with the tracks of this company on Market street; thence along Valencia street to Mission street.

Second. Commencing at the city front at the intersection or junction of Market and East streets; thence along East Street to Mission street; thence along Mission street and West Mission street and Mission street road and Telegraph or New County road to the southerly boundary line of said city and county; thence to such point in the County of San Mateo, in said State, as the Board of Directors of this corporation may determine upon and the Board of Supervisors or Trustees of said County of San Mateo may authorize; also commencing at the intersection or junction of Mission and Twenty-ninth streets; thence along Twenty-ninth street to Noe; also commencing at the intersection or junction of Mission street and Cortland avenue; thence along Cortland avenue to Butler street; thence along Butler street to Blaine street; thence along Blaine street to North avenue; thence along North Avenue to Cortland avenue; and along California avenue from Cortland avenue to Powell avenue; thence along Powell avenue to Mission street; also along Virginia avenue from California avenue to Mission street; also commencing at the intersection or junction of Mission street and Richland avenue; thence along Richland avenue to Andover avenue; thence along Andover avenue to East Park street; thence along East Park street, Holly Park avenue and West Park street to Holly street, and along Holly street from Mission street to Richland avenue.

Third. Commencing at the city front at the intersection or junction of Mission and East streets, there connecting with the tracks of this company on East street; thence along East street to Howard street; thence along Howard street to Twenty-sixth street; thence along the line of Howard street when opened and extended, to Army street; also commencing at the intersection of Valencia and Army streets; thence along Army street, Precita avenue and Colusa street to the junction of San Bruno road, Nebraska street and Colusa street; thence along Colusa street to its easterly termination.

183 Fourth. Commencing at the city front at the intersection or junction of Howard and East streets, there connecting with the tracks of this company on East street; thence along East street to Folsom street; thence along Folsom street to Stoneman street; also commencing at the intersection or junction of Market and Steuart streets; thence along Steuart street to Folsom street.

Fifth. Commencing at the intersection or junction of Market and Spear streets; thence along Spear street to Bryant street; thence along Bryant street and across Channel street to Bryant avenue; thence along Bryant avenue to Precita avenue.

Sixth. Commencing at the intersection of Beale and Bryant streets, there connecting with the tracks of this company on Bryant street; thence along Beale street to Brannan street; thence along Brannan street to Channel street; thence along Channel street to Potrero avenue; thence along Potrero avenue to Precita avenue; also commencing at the intersection of Potrero avenue and Yolo street; thence along Yolo street to Nebraska street; also commencing at the intersection or junction of Nebraska and Twenty-fourth streets; thence along Nebraska street to San Bruno road; thence along San Bruno road to its southerly termination; also commencing at the intersection or junction of San Bruno road with Teneriffe street or Fifteenth avenue; thence along Teneriffe street or Fifteenth avenue to its southeasterly termination; also commencing at the intersection or junction of Nebraska and Twenty-fourth streets; thence along Twenty-fourth street to Ellen street; also commencing at the intersection of Twenty-fourth and Noe streets; thence along Noe street to Jersey street; thence curving into and along Jersey street to the car house of this company on Jersey street between Noe and Castro streets; also commencing at the intersection or junction of Potrero avenue and Twenty-third street; thence along Twenty-third street to Church street; also commencing at the intersection of Potrero avenue and Twenty-second street; thence along Twenty-second street to Chattanooga street; thence along Chattanooga street to Twenty-fourth street; also commencing at the intersection of Dolores and Twenty-second streets; thence along Dolores street to Twenty-fourth street; also commencing at the intersection or junction of Potrero avenue and Twenty-sixth street; thence along Twenty-sixth street to Bellevue street.

Seventh. Commencing at the intersection of California and Battery streets, there connecting with the tracks of this company on California street; thence along Battery street to Bush street; thence in a direct line and across Market street to its intersection or junction with First street; thence along First street to Brannan street, and connecting with the tracks of this company on Folsom street.

Eighth. Commencing at the intersection of Jackson and Sansome streets; thence along Sansome street to Market street; thence along Market street to Second street; thence along Second street to Townsend street; thence along Townsend street to Fourth street.

184 Ninth. Commencing at the intersection of Jackson and Montgomery streets; thence along Montgomery street to Market street; thence along Market street to Third street; thence

along Third street to Berry street; thence along Berry street to Fifth street; also commencing at the intersection of Third and Tehama streets; thence along Tehama street to Fourth street.

Tenth. Commencing at the intersection or junction of Kentucky and Fourth streets; thence along Fourth street to Market street; thence across Market street to its intersection or junction with Stockton street; thence along Stockton street to Union street.

Eleventh. Commencing at the intersection or junction of Market and Fifth streets, there connecting with the tracks of this company on Market street; thence along Fifth street to Kentucky street.

Twelfth. Commencing at the intersection of Post and Taylor streets; thence along Taylor street to Market street; thence across Market street to Sixth street; thence along Sixth street to the southerly termination of Sixth street.

Thirteenth. Commencing at the intersection or junction of Sixth and Bluxome streets; thence along Bluxome street to the east line of Fourth street; thence through private property to Townsend street, there connecting with the tracks of this company on Townsend street.

Fourteenth. Commencing at the intersection or junction of Market and Seventh streets, there connecting with the tracks of this company on Market street; thence along Seventh street to King street.

Fifteenth. Commencing at the intersection or junction of Market and Eighth streets, there connecting with the tracks of this company on Market street; thence along Eighth street to and across Townsend and Channel streets to Kansas street, connecting with the tracks of this company on Brannan street at its intersection with Eighth street; and from the intersection or junction of Channel and Kansas streets, along Kansas street to Santa Clara street; thence along Santa Clara street to Connecticut street; thence along Connecticut street to Solano street; thence along Solano street to Kentucky street; also commencing at the intersection or junction of Kentucky and Fourth streets; thence along Kentucky street to and across Tulare street, Islais Creek channel, and Islais street to Railroad avenue; thence along Railroad avenue, and by the most practicable route to the southerly boundary line of said city and county; also commencing at the intersection of Napa and Kentucky streets, there connecting with the tracks of this company on Kentucky street; thence along Napa street to Maryland street.

Sixteenth. Commencing at the intersection or junction of Potrero avenue with Channel and Brannan streets; thence along Channel street to Tenth street; thence along Tenth street to Market street; thence across Market street to the intersection or junction of
185 Market, Fell and Polk streets; thence along Fell street to Stanyan street; thence along Stanyan street to Fulton street, there connecting with the tracks of this company on Fulton street; also commencing at the intersection of Fell and Franklin streets; thence along Franklin street to Oak street; also commencing at the intersection or junction of Market, Fell and Polk streets, there connecting with the tracks of this company on Fell street; thence along Market street to Kearny street; thence along Kearny street to Montgomery avenue.

Seventeenth. Commencing at the intersection or junction of Illinois and Sixteenth streets; thence along Sixteenth street to Market street; thence along Market street to Seventeenth street; thence along Seventeenth street to Ashbury street; thence along Ashbury street to its junction with Clayton street, or the southerly extensions thereof; thence along such southerly extension of Clayton street and Clayton street to the northerly line of San Miguel Rancho; thence continuing northerly either along Clayton street or through and across private property to Carl street; thence across Carl street and through and across private property to the intersection of Cole street with Frederick street.

Eighteenth. Commencing at the intersection or junction of Market and Haight streets, there connecting with the tracks of this company on Market street; thence along Haight street to Golden Gate Park.

Nineteenth. Commencing at the intersection of Mission and Fourteenth streets, there connecting with the tracks of this company on Mission street; thence along Mission and West Mission streets to Potter street; thence along Potter street to Market street; thence across Market street to Page street; thence along Page street to Stanyan street; also commencing on West Mission street at a point where the line of Mission street projected northerly would intersect said street; thence northerly across Brady and Market streets to Page street.

Twentieth. Commencing at the intersection or junction of Market and Oak streets, there connecting with the tracks of this company on Market street; thence along Oak street to Stanyan street; thence along Stanyan street to Carl street; thence along Carl street to First avenue; thence along First avenue to and upon H street; also commencing at the intersection or junction of Hugo street and First avenue; thence along Hugo street to Seventh avenue; also commencing at the intersection or junction of Carl street and First avenue; thence along First avenue to I street; thence along I street to Fifteenth avenue; thence along Fifteenth avenue to and upon H street; also commencing at the intersection of Seventh avenue and I street; thence along Seventh avenue to and upon H street.

Twenty-first. Commencing at a point on Stanyan street between Waller and Frederick streets; thence curving to the right across Golden Gate Park and Willard street, and through private property and across First avenue to H street; thence westerly along H
186 street to the vicinity of the Great Highway; thence curving northerly and deflecting easterly and across Golden Gate Park to the intersection of D street and Forty-ninth avenue; thence along Forty-ninth avenue to B street; also curving into Waller street from Stanyan street; thence along Waller street to Shrader street.

Twenty-second. Commencing at the intersection of Oak street and Masonic avenue; thence along Masonic avenue to Frederick street; thence along Frederick street to the westerly line of First avenue, and connecting with the tracks of this company on Page street at its intersection with Masonic avenue.

Twenty-third. Commencing at the intersection or junction of Market and Hayes streets, there connecting with the tracks of this

company on Market street; thence along Hayes street to Stanyan street.

Twenty-fourth. Commencing at the intersection or junction of Market and McAllister streets, there connecting with the tracks of this company on Market street; thence along McAllister street to Lott street; thence southwest to Fulton street; thence along Fulton street and D street to the Great Highway.

Twenty-fifth. Commencing at the intersection or junction of Market and Turk streets, there connecting with the tracks of this company on Market street; thence along Turk street to and upon and across First avenue to B street; thence along B street to Nineteenth avenue; thence along Nineteenth avenue to, upon and across D street to Golden Gate Park; also commencing at the intersection of Turk and Baker streets; thence along Baker street to Fell street.

Twenty-sixth. Commencing at the intersection or junction of Market and Eddy streets, there connecting with the tracks of this company on Market street; thence along Eddy street to its westerly termination.

Twenty-seventh. Commencing at the intersection or junction of Market and Ellis streets, there connecting with the tracks of this company on Market street; thence along Ellis street to Broderick street; thence along Broderick street to Haight street.

Twenty-eighth. Commencing at the intersection or junction of Market and Geary streets, there connecting with the tracks of this company on Market street; thence along Geary street to its junction with Point Lobos avenue; thence along Point Lobos avenue to its junction with the road known as Point Lobos road, or Cliff House road; thence along said last-named road to the westerly end thereof; also commencing at the intersection of Fifth and Point Lobos avenues; thence along Fifth avenue to Golden Gate Park.

Twenty-ninth. Commencing at the junction of Market, Post and Montgomery streets, there connecting with the tracks of this company on Market street; thence along Post street to Central avenue.

Thirtieth. Commencing at the intersection or junction of Market and Sutter streets, there connecting with the tracks of this
187 company on Market street; thence along Sutter street to Grant avenue; also commencing at the intersection or junction of Market and Bush streets, there connecting with the tracks of this company on Market street; thence along Bush street to Grant avenue; also commencing at the intersection of Bush street and Grant avenue; thence along Grant avenue to Market street; also commencing at the intersection or junction of Market and Pine streets, there connecting with the tracks of this company on Market street; thence along Pine street to Kearny street; also commencing at the intersection or junction of Market and California streets, there connecting with the tracks of this company on Market street; thence along California street to and upon Kearny street.

Thirty-first. Commencing at the intersection of Market and Sacramento streets, there connecting with the tracks of this company on Market street; thence along Sacramento street to and upon and across First avenue to Lake street; thence along Lake street to Sixth avenue; thence along Sixth avenue to Golden Gate Park; also com-

mencing at the intersection or junction of Sixth avenue and Lake street; thence along Lake street to Seventh avenue; thence along Seventh avenue to Golden Gate Park.

Thirty-second. Commencing at the city front at the intersection or junction of Market and East streets; thence along East street to Clay street; thence along Clay street to First avenue; also commencing at the intersection of Clay and Larkin streets; thence along Larkin street to Sacramento street; also commencing at the intersection of Clay and Scott streets; thence along Scott street to Sacramento street.

Thirty-third. Commencing at the intersection or junction of East and Clay streets, there connecting with the tracks of this company on East street; thence along East street to Washington street; thence along Washington street to Steiner street; thence along Steiner street to Jackson street.

Thirty-fourth. Commencing at the intersection or junction of East and Washington streets, there connecting with the tracks of this company on East street; thence along East street to Jackson street; thence along Jackson street to First avenue; thence along First avenue to Golden Gate Park; also commencing at the intersection of Jackson street and Central avenue, there connecting with the tracks of this company on Jackson street; thence along Central avenue to California street; thence along California street to or near the city cemetery; thence northerly along or near Thirty-second avenue to and across Lake street; thence in a northwesterly, westerly, southwesterly and southerly direction near to and following generally the line of the ocean shore to Forty-eighth avenue; thence along Forty-eighth avenue to the Cliff House road.

Thirty-fifth. Commencing at the intersection or junction of East and Jackson streets, there connecting with the tracks of this company on East street; thence along East street to Pacific street; thence along Pacific street to Mason street; also commencing at the intersection or junction of East and Pacific streets, there connecting with the tracks of this company on East street; thence along
188 East street to Broadway; thence along Broadway to Mason street; also commencing at the intersection of Montgomery avenue and Vallejo street; thence along Vallejo to Devisadero street.

Thirty-sixth. Commencing at the intersection of Washington street and Montgomery avenue; thence along Montgomery avenue to Beach street; also commencing at the intersection of Taylor street and Montgomery avenue; thence along Taylor street to Bay street; thence along Bay street to East street and the water front; also commencing at the intersection of Dupont and Pacific streets; thence along Dupont street to Broadway.

Thirty-seventh. Commencing at the intersection or junction of Market and Powell streets, there connecting with the tracks of this company on Market Street; thence along Powell street to Jefferson street; also commencing at the intersection of Powell and Union streets; thence along Union street to Stockton street; also commencing at the intersection of Sacramento and Mason streets; thence along Mason street to Jefferson street; thence along Jefferson street to Powell street.

Thirty-eighth. Commencing at the intersection of Post and Leavenworth streets; thence along Leavenworth street to Park avenue, thence along Park avenue to Grove street; thence along Grove street to Polk street; thence along Polk street to and upon Market street, there connecting with the tracks of this company from Fell street across Market street to Tenth street.

Thirty-ninth. Commencing at the intersection or junction of Market and Church streets, there connecting with the tracks of this company on Market street, and with those on Church street on the southerly side of Market street; thence across Market street and along Church street to its intersection with Hermann or Kate street; thence westerly along Hermann or Kate street to its intersection with Fillmore street; also commencing at the intersection of Church and Ridley streets; thence along Ridley street to its intersection with Fillmore street; thence along Fillmore street to the northerly end thereof.

Fortieth. Commencing at the intersection or junction of Market, Castro and Seventeenth streets, there connecting with the tracks of this company on Market street and with those on Castro street on the southerly side of Market street; thence across Market street and along Castro street to Ridley street; thence along Ridley street to Devisadero street; thence along Devisadero street to the northerly end thereof; also curving from Devisadero street into and along O'Farrell street to a proposed car house on O'Farrell street, between Devisadero and Scott streets.

The total length of said roads, as estimated, is one hundred and seventy-five miles or thereabouts.

Forty-first. Also along and upon other parts of the same or any other streets, alleys, highways, roads or lands in said City and County of San Francisco and said County of San Mateo.

189 To acquire, hold and own all rights, franchises and privileges which have been heretofore or may hereafter be granted in respect to said railroads or any part thereof.

To buy, lease, let, own, sell, mortgage and deal in real estate, and to improve the same.

To produce and sell motive power and illuminating light of every description, manufacture and sell wire cables, construct and sell cars and other railway equipment and appliances.

To buy, barter for, sell, exchange, hypothecate and deal in the shares or capital stock of other street railroad corporations or corporations of any kind.

To buy, sell and deal in letters-patent, patent rights and inventions appertaining to the construction, operation and business of street railroads.

To carry on, conduct and engage in any business transaction or matter which may or can be included or appertain to any of the purposes aforesaid.

III.

The place where the principal place of business of said corporation is to be transacted is the City and County of San Francisco, State of California.

IV.

The term for which said corporation is to exist is fifty years from the date hereof.

V.

The number of directors of said corporation is to be nine, and the names and residences of those appointed for the first year are as follows:

Names.	Residence.
Charles F. Crocker	San Francisco, Cal.
H. E. Huntington	San Francisco, Cal.
Charles G. Lathrop	San Francisco, Cal.
A. Hayward	San Mateo, Cal.
M. D. Stein	San Francisco, Cal.
W. J. Adams	San Mateo County, Cal.
N. T. Smith	San Mateo County, Cal.
J. L. Willcutt	Oakland, Cal.
F. S. Douty	San Francisco, Cal.

VI.

The capital stock of said corporation is to be eighteen million seven hundred and fifty thousand dollars ($18,750,000.00), divided into one hundred and eighty-seven thousand five hundred (187,500) shares of the par value of one hundred dollars each.

VII.

The amount of capital stock which was actually subscribed in each of said corporations, parties hereto, at the time of their formation, and the names of the persons by whom the same was subscribed,
190 and the number of shares subscribed by and then held by each was as set forth in the original articles of incorporation of the several companies, now consolidated and amalgamated, and the same was, and now is, more than one thousand dollars per mile of the estimated length of the several railroads mentioned and described in the said respective articles of incorporation.

VIII.

That of the capital stock of each of said corporations there had at the time of their formation (where the same was required by law) been actually paid to the respective treasurers thereof the amounts specified in their original articles of incorporation verified by the affidavits filed in the office of secretary of State of the State of California, and the amounts so paid in, were in each case ten per cent of the subscribed capital stock.

IX.

The amount of the capital stock of the said corporations which has been subscribed and actually paid in exceeds the amount of one

thousand dollars per mile of the entire length of the said railroads as estimated and as stated and set forth in Article II hereof.

In witness whereof, the said parties have caused these presents to be signed by their respective Presidents or Vice-Presidents and Secretaries, and their corporate seals to be hereunto affixed, pursuant to resolutions of their respective Boards of Directors, this 13th day of October, 1893.

MARKET STREET CABLE RAILWAY COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

MARKET STREET AND FAIRMOUNT RAILWAY COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

CITY RAILROAD COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

POTRERO AND BAY VIEW RAILROAD COMPANY,

[CORPORATE SEAL.] By H. E. HUNTINGTON, *President.*
J. L. WILLCUTT, *Secretary.*

SOUTHERN HEIGHTS AND VISITACION RAILWAY COMPANY,

[CORPORATE SEAL.] By H. E. HUNTINGTON, *President.*
J. L. WILLCUTT, *Secretary.*

PARK AND OCEAN RAILROAD COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

OCEAN BEACH RAILWAY COMPANY,

[CORPORATE SEAL.] By H. E. HUNTINGTON, *President.*
J. L. WILLCUTT, *Secretary.*

CENTRAL RAILROAD COMPANY,

[CORPORATE SEAL.] By CHAS. F. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

THE OMNIBUS CABLE COMPANY,

[CORPORATE SEAL.] By M. D. STEIN, *President.*
TH. KRAUSS, *Secretary.*

THE NORTH BEACH AND MISSION RAILWAY COMPANY,

[CORPORATE SEAL.] By M. D. STEIN, *President.*
H. W. HATHORNE, *Secretary.*

FERRIES AND CLIFF HOUSE RAILWAY COMPANY,

[CORPORATE SEAL.] By W. J. ADAMS, *President.*
GEO. H. WAGGONER, *Secretary.*

191 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Market Street Cable Railway Company, one of the corporations described in and who executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Market Street and Fairmount Railway Company, one of the corporations described in and who exe-*Company, one of the corporations described in and who exe* cuted the within and *cuted the within and* annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Park and Ocean Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

192 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared H. E. Huntington, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Ocean Beach Railway Company, one of the corporations described in and who executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared H. E. Huntington, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Potrero and Bay View Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco,

duly commissioned and sworn, personally appeared H. E. Huntington, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Southern Heights and Visitacion Railway Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

193 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the City Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Charles F. Crocker, known to me to be the President, and J. L. Willcutt, known to me to be the Secretary of the Central Railroad Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared M. D. Stein, known to me to be the president, and Theodore Krauss, known to me to be the Secretary of The Omnibus Cable Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

194 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared M. D. Stein, known to me to be the President, and H. W. Hathorne, known to me to be the Secretary of The North Beach and Mission Railway Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 13th day of October, A. D. 1893, before me, E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared W. J. Adams, known to me to be the President, and G. H. Waggoner, known to me to be the Secretary of the Ferries and Cliff House Railway Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Market Street Cable Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferries and Cliff
195 House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this fifth day of September, A. D. 1893.

C. P. HUNTINGTON.
A. D. HUNTINGTON.
STILLMAN & HUBBARD.
CHAS. F. CROCKER.
HARRIET V. ALEXANDER.
H. E. HUNTINGTON.
CHAS. G. LATHROP.
WM. H. CROCKER.
W. E. BROWN.
C. E. GREEN.
GEORGE CROCKER.
CHAS. F. CROCKER, *Trustee.*
WM. H. CROCKER, *Trustee.*
N. T. SMITH.
J. L. WILLCUTT.
A. N. TOWNE.
WM. H. MILLS.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Market Street and Fairmount Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mis-

sion Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
H. E. HUNTINGTON.
N. T. SMITH.
CHAS. F. CROCKER.
C. E. GREEN.
W. V. HUNTINGTON.
J. L. WILLCUTT.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the City Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and
196 Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
CHAS. F. CROCKER.
H. E. HUNTINGTON.
N. T. SMITH.
F. S. DOUTY.
GEORGE CROCKER.
W. V. HUNTINGTON.
J. L. WILLCUTT.
C. E. GREEN.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Potrero and Bay View Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of the said companies with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market

Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this fifth day of September, A. D. 1893.

[SEAL.]

C. P. HUNTINGTON.
STILLMAN & HUBBARD.
CHAS. F. CROCKER.
CROCKER ESTATE CO.,
By GEORGE CROCKER,
Vice-President.
N. T. SMITH.
C. E. GREEN.
H. E. HUNTINGTON.
J. L. WILLCUTT.

197 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Southern Heights and Visitacion Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, City Railroad Company, Central Railroad Company, The Omnibus Cable Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this nineteenth day of September, A. D. 1893.

[SEAL.]

H. E. HUNTINGTON.
CHAS. F. CROCKER.
J. L. WILLCUTT.
N. T. SMITH.
F. S. DOUTY.
C. E. GREEN.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Park and Ocean Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said company with the capital stock, debts, properties, assets and

franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, the Omnibus Cable Company, the North Beach and Mission Railway Company, and the Ferris and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
H. E. HUNTINGTON.
N. T. SMITH.
W. E. BROWN.
GEORGE CROCKER.
J. L. WILLCUTT.
CHAS. F. CROCKER.

198 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Ocean Beach Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The Omnibus Cable Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
H. E. HUNTINGTON.
N. T. SMITH.
CHAS. F. CROCKER.
J. L. WILLCUTT.
F. S. DOUTY.
GEORGE CROCKER.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Central Railroad Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of the said

Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, the Omnibus Cable Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this eleventh day of October, A. D. 1893.

[SEAL.] PACIFIC IMPROVEMENT CO.,
By F. S. DOUTY, *Secretary.*
CHAS. F. CROCKER.
H. E. HUNTINGTON.
N. T. SMITH.
J. L. WILLCUTT.
W. E. BROWN.
S. T. GAGE.
F. S. DOUTY.
GEORGE CROCKER.
A. J. GUNNISON.

199 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this twenty-first day of September, A. D. 1893.

A. HAYWARD.
SUTRO & CO.
GUSTAV SUTRO.
EUGENE LE ROY.
GEORGES LE ROY,
By EUGENE LE ROY, *His Attorney in Fact.*
HOWARD HAVENS.
TH. KRAUSS, *Trustee.*
E. HULL.
M. D. STEIN.
M. D. STEIN,
M. EHRMAN,
(Executors of the Last Will and Testament of Daniel Stein, Deceased.)
J. A. DONOHOE, JR., *Trustee.*
PHIL. BARTH, *Trustee.*
SUTRO & CO., *Trustee.*
JAMES GILLON, *Trustee.*
P. B. PETTIGREW, *Trustee.*
JAMES ROLPH, *Trustee.*
F. REICHLING,
By L. F. REICHLING.
JOHN McKEE, *Trustee.*
PHIL. BARTH, *Trustee.*
DOLLIVER & BRO.
EDWARD BARRY.
J. H. JELLETT, *Trustee.*
JONAS SCHOENFELD, *Trustee.*
JOHN W. LYNCH.
AMELIA H. McALLISTER,
By M. HALL McALLISTER, *Atty. in Fact.*
O. H. SMITH.
W. H. RICHTER.
I. S. BELCHER.
E. RENIER.
A. L. PRINGLE.
WM. WATSON.
H. H. GRAY.
MALACHY WHELAN.
KATE JOHNSON,
B. BANGS, *Agent.*
ANT. MICHALITSCHKE.
ELIZA BAUM.
GEORGES LE ROY.
EDWARD E. KENTFIELD.
JAMES DUNN.
B. P. OLIVER,
By J. COSTA, *His Attorney in Fact.*
MARY A. TOBIN,
By ALFRED TOBIN, *Her Attorney in Fact.*
WM. H. JORDAN.
MARY L. TREANOR,
By WM. H. JORDAN, *Her Attorney.*
WM. GRUENHAGEN.

200 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Board of Directors of said companies.

Done this second day of October, A. D. 1893.

ROWE & ROSENBERG.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this third day of October, A. D. 1893.

THOS. EMERY'S SONS.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The Omnibus Cable Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The North Beach and Mission Railway Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this fifth day of October, A. D. 1893.

H. MATTHEWS.

201 This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of The North

Beach and Mission Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Rail-Road Company, The Omnibus Cable Company, and the Ferries and Cliff House Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this twenty-first day of September, A. D. 1893.

[SEAL.]

A. HAYWARD.
GUSTAV SUTRO.
EUGENE LE ROY.
EUGENE LE ROY, *Trustee.*
M. D. STEIN.
ED. KAUFMANN.
W. S. WOOD.
R. H. LLOYD.
DANIEL MEYER, *Trustee.*
ALBERT MEYER.
ALBERT MEYER, *Trustee.*
H. E. HUNTINGTON.
PACIFIC IMPROVEMENT CO.,
By H. E. HUNTINGTON, *President.*
By F. S. DOUTY, *Secretary.*
F. S. DOUTY.
CHAS. F. CROCKER.

This is to certify that we, the undersigned, being holders of more than three-fourths in value of all stock of the Ferries and Cliff House Railway Company, do hereby assent to the amalgamation and consolidation of the capital stock, debts, properties, assets and franchises of said Company with the capital stock, debts, properties, assets and franchises of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, City Railroad Company, Central Railroad Company, The Omnibus Cable Company, and the North Beach
202 and Mission Railway Company, in such manner as may be agreed upon by the respective Boards of Directors of said companies.

Done this thirtieth day of September, A. D. 1893.

[SEAL.]

W. H. MARTIN.
H. H. LYNCH.
W. J. ADAMS.
JOHN BALLARD.
THOMAS MAGEE.
I. STRASSBURGER.
G. H. WAGGONER, *Tr.*
ROGER D. MAGEE.
WM. A. MAGEE.
H. H. LYNCH, *Trustee.*
I. STRASSBURGER, *Trustee.*

(Endorsed:) Filed in the office of the County Clerk of the City and County of San Francisco, State of California, the 13th day of October, A. D. 1893. M. C. Haley, County Clerk, by J. J. Lynch, Deputy County Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, M. C. Haley, County Clerk of the City and County of San Francisco, State of California, hereby certify the foregoing to be a full, true and correct copy of the original Articles of Consolidation, Amalgamation and Incorporation of the Market Street Cable Railway Company, Market Street and Fairmount Railway Company, City Railroad Company, Potrero and Bay View Railroad Company, Southern Heights and Visitacion Railway Company, Park and Ocean Railroad Company, Ocean Beach Railway Company, Central Railroad Company, The Omnibus Cable Company, The North Beach and Mission Railway Company, and Ferries and Cliff House Railway Company, filed in my office on the 13th day of October, A. D. 1893.

Attest my hand and my official seal this 13th day of October, A. D. 1893.

[SEAL.]

M. C. HALEY,
County Clerk,
By J. J. LYNCH,
Deputy County Clerk.

(Endorsed:) Filed in the office of the Secretary of State the fourteenth day of October, A. D. 1893. E. G. Waite, Secretary of State, by W. H. Stevens, Deputy. Record Book, —; Page —.

203 EXHIBIT D.

Order No. 2858.

Granting to the Market-Street Railway Company, Its Successors and Assigns, Certain Rights and Privileges Herein Specified.

Whereas, the right, privilege and franchise heretofore applied for by the Market-Street Railway Company and hereinafter set forth and described, have been submitted to public competition by the publication thereof in the San Francisco Daily Report, a daily newspaper of general circulation printed and published in the city and county of San Francisco, for ten successive days from and after the publication of the notice *of* submitting the same; and whereas, twenty days have elapsed from and after the last day of publication of the said notice; and whereas, the Market-Street Railway Company, a corporation, has filed a bid or offer with this board in the sum of $605 for the right, privilege and franchise hereinafter set forth and described, the said petitioners being the best and only bidder therefor, which bid has been accepted; now, therefore,

The People of the City and County of San Francisco do ordain as follows:

Section 1. The right is hereby granted to the Market-Street Railway Company, its successors and assigns, to construct, lay down, maintain and operate for the unexpired terms of the respective franchises heretofore granted on the street, between which the connections are to be made, as an extension of and adjunct to and in connection with street railroads now owned or operated by the Market-Street Railway Company, or for the construction of which it holds franchises, a single or double-track street railroad, with all necessary and convenient stations, sidetracks, switches, turn-outs, turntables and appliances along and upon the following streets in the city and county of San Francisco, to-wit:

204 From a connection with the line of the Market-Street Railway Company on Sixteenth street at or near its intersection with Church street; thence along and upon Church street to Ridley street and thence along and upon Ridley street to Fillmore street, to a connection with the line of the Market-Street Railway Company on Fillmore street at or near its intersection with Ridley street.

Section 2. The foregoing grant is made upon the following conditions, to be strictly complied with by the said grantee, its successors and assigns:

First. To construct the tracks of said railroads on these portions of the streets above designated as nearly as possible in the middle thereof.

Second. To plank, pave or macadamize the entire length of the streets to be used by their tracks between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street and with good crossings.

Third. The tracks must not be more than five feet wide between the rails and must have a space between them sufficient to allow the cars to pass each other freely.

Fourth. Work to construct said railroads must be commenced within one year from the date of the passage of this ordinance, and the same must be completed within three years thereafter.

Section 3. It shall be lawful for said grantee, its successors and assigns, at its or their option, to propel cars over said railroads or any thereof, by electricity with modern appliances and requirements, or by wire ropes running under said streets and moved by stationary steam engines, or by such other means as may be sanctioned by law.

Whenever said grantee, its successors or assigns, shall elect to operate said railroads or any thereof, by the use of an endless wire rope or cable and stationary steam engine, it shall be lawful for said grantee, its successors or assigns, to make all needful and convenient trenches and excavations in any of said streets under which they propose to place such rope or cable, and to place in such trenches
205 and excavations all needful and convenient machinery for operating said railroad in the manner and by the means aforesaid. It shall also be lawful for said grantee, its successors and assigns, to erect and maintain at convenient and suitable points along the line of the streets under which such wire ropes or cables are placed steam engines and boilers of ample and sufficient power, and to connect the same with said wire ropes or cables. All such trenches and excavations shall be beneath the surface of the street, which surface shall be securely supported, so as not to impair the use and enjoyment of the streets by the public; the framework of all trenches and excavations in which wire ropes or cables are placed shall be constructed in a substantial and workmanlike manner, and the slot or aperture opening into said trenches or excavations shall not exceed seven-eighths of an inch in width.

Section 4. Whenever it shall be necessary for said grantee, its successors and assigns, to pave or macadamize said railroad tracks or any thereof, as hereinbefore provided, the same material therefor shall be used as is or may be used by said city and county in respect to the remainder of the street, unless otherwise ordered or directed by the Board of Supervisors of said city and county.

Whenever any street or part of a street over which this franchise is granted shall be ordered *or* improved or reimproved and the work of improving or reimproving such street shall be let by contract by the Board of Supervisors or other governing body of this city and county, the portion of said street occupied or to be occupied by the track or tracks of the grantee or grantees of this franchise, between the rails, between the tracks and for two feet on either side of the tracks laid or to be laid, shall be let together with the rest of the street or streets, and the grantee-, their successors or assigns shall be held liable
206 from and after the passage and approval of this order for the payment of the cost of said improvement or improvements, which cost shall be assessed in the proper proportion for the work done between the rails, between the tracks, if there be more than one track, and for two feet on either side of the track or tracks, to the work

done upon the entire width of the street or streets so improved or re-improved, and said cost shall be collected in the manner provided for the collection of other street assessments, and shall become a lien upon the roadbed, rolling stock and franchise of said road.

Section 5. The rights hereinbefore granted are upon the express condition that said grantee, its successors and assigns, shall at all times during the continuance of the franchise aforesaid permit and allow mail carriers in the employ of the United States Government, at all times while engaged in the actual discharge of their duty, to ride on the cars of the railroads hereinbefore described without paying any sum of money whatever for fare or otherwise, and that the franchises hereby granted shall not be operative or effectual until said grantee shall have filed its written promise and undertaking as hereinafter provided.

Section 6. Said grantees are required to file in the office of the Clerk of the Board of Supervisors of this city and county an acceptance in writing of the provisions of this order, and a promise and undertaking to permit mail carriers to ride on its said cars, as in the last preceding section of this order provided, and thereupon the provisions of this order shall be deemed and taken to be a contract between said grantee, its successors and assigns, and said city and county. Unless said acceptance, promise and undertaking be filed within twenty days after the passage or approval of this order, this order shall become, be and remain null, void and of no effect.

207 Section 7. This order shall take effect from and after the date of its passage.

And the Clerk is hereby directed to advertise this order as required by law.

In Board of Supervisors.

San Francisco, April 15, 1895.

Adopted by the following vote:

Ayes: Supervisors King, Scully, Benjamin, Hirsch, Hughes, Dunker, Morgenstern, Wagner.

Noes: Supervisors Dimond, Taylor, Spreckles, Hobbs.

JNO. A. RUSSELL, *Clerk*.

(Here follows diagram marked p. 208.)

GOLDEN GATE
PRESIDIO
LINCOLN PARK
OCEAN

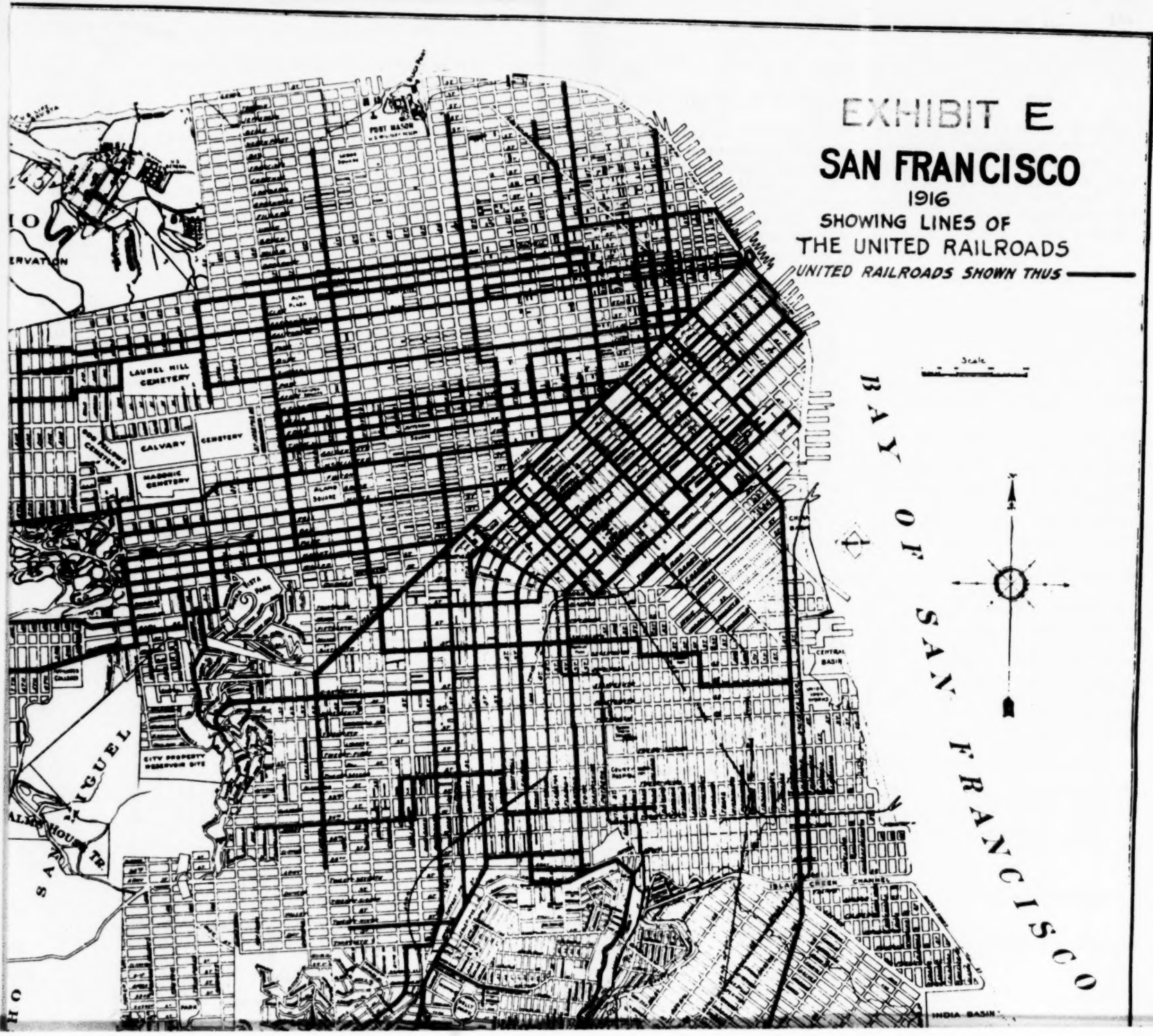
EXHIBIT E
SAN FRANCISCO
1916
SHOWING LINES OF
THE UNITED RAILROADS
UNITED RAILROADS SHOWN THUS
Scale
LAUREL HILL CEMETERY
CALVARY CEMETERY
MASONIC CEMETERY
BAY OF SAN FRANCISCO
SAN MIGUEL
CITY PROPERTY RESERVOIR SITE
CENTRAL BASIN
INDIA BASIN

209 EXHIBIT "F."

Bill No. 3410, Ordinance No. 3110 (New Series).

Directing the Board of Public Works to prepare plans, specifications and contracts and advertise for bids for furnishing, delivering the necessary materials therefor, and constructing the Church Street extension of the Municipal Railway System, for which bonds were provided in the bond issue authorized August 26, 1913, and approving the plan for overcoming the grades between Eighteenth and Twenty-second streets by diversion through Mission Park and private property between Twentieth and Twenty-second streets.

Be it ordained by the People of the City and County of San Francisco, as follows:

Section 1. The Board of Public Works is hereby authorized, instructed and empowered to immediately prepare plans, specifications and contracts, and advertise for bids for furnishing the additional materials necessary, and constructing an extension to the Municipal Railway System, for which funds were provided in the bond issue authorized August 26, 1913, which extension is more specifically described as follows:

Connecting with the tracks of the Van Ness avenue street railway at Market Street, thence along Market street to Church street, thence along Church street to Eighteenth Street, thence by a diversion through the westerly side of Mission Park to Twentieth street and Church Street, thence across a right of way to be acquired through private property between Twentieth and Twenty-second streets to Twenty-second and Church streets, thence along Church street to Thirtieth street.

Section 2. The plan submitted by the City Engineer through the Board of Public Works for overcoming the steep grades on Church street between Eighteenth and Twenty-second streets by means of a diversion through Mission Park and private property between Twentieth and Twenty-second streets, which plan is on file
210 in the office of the Board of Supervisors, is hereby approved.

Section 3. The Board of Public Works is hereby authorized and permitted to incorporate in the contracts for said extension to the Municipal Railway System provisions to the effect that progressive payments shall be made as provided by Section 21, Article IV, Chapter 1, of the Charter.

Section 4. This Ordinance shall take effect immediately.

Finally passed—Board of Supervisors, San Francisco, Feb. 8, 1915.

Ayes: Supervisors Bancroft, Gallagher, Hilmer, Hocks, Jennings, Kortick, McLeran, Murdock, Payot, Suhr, Vogelsang.

Noes: Supervisors Deasy, McCarthy, Nelson, Nolan, Power and Walsh.

Absent: Supervisor Hayden.

J. S. DUNNIGAN, *Clerk.*

Approved, San Francisco, Feb. 17, 1915.

JAMES ROLPH, JR., *Mayor.*

211 EXHIBIT G.

Resolution 12887 (New Series).

Resolved, that the Board of Public Works be directed to proceed without delay to complete the Church Street Railway from Church and Sixteenth streets to Market street and thence along Market street to Van Ness Avenue, there connecting with the tracks of the Municipal Railway on Van Ness avenue, according to the provisions of Ordinance No. 3110 (New Series), such construction to consist of double tracks laid outside of the rails of the United Railways and such overhead electrical construction and appurtenances as may be necessary.

Adopted—Board of Supervisors, San Francisco, May 1, 1916.
Ayes: Supervisors Brandon, Deasy, Gallagher, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLeran, Mulvihill, Nolan, Nelson, Power, Suhr, Walsh, Welch, Wolfe.
Approved, San Francisco, May 1, 1916.

J. S. DUNNIGAN, *Clerk.*
JAMES ROLPH, JR., *Mayor.*

212 EXHIBIT H.

Bill No. 4059, Ordinance 3736 (New Series).

Ordering and providing for the construction of an extension of the Municipal Railway system along Market Street from the easterly portal of the Twin Peaks Tunnel to Church Street and from Van Ness Avenue to the existing Municipal Railway tracks in Market Street at Kearny Street.

Be it ordained by the People of the City and County of San Francisco as follows:
Section 1. The Board of Public Works is hereby directed to prepare plans and specifications for the construction of an extension of the Municipal Street Railway system to consist of double tracks, crossovers, switches, etc., and the necessary overhead electrical appurtenances from the easterly portal of the Twin Peaks Tunnel along Market Street to Church Street connecting with the tracks of the Municipal Railway proposed to be laid in Market Street from Church Street to Van Ness Avenue, connecting with the tracks of the Municipal Railway in Van Ness Avenue, thence along Market Street and connecting with the tracks of the Municipal Railway in Market Street near Kearny Street.
Section 2. Upon the completion of said plans and specifications the said Board of Public Works shall transmit the same to the Board of Supervisors together with requests for such appropriations

and additional authority as may be required for the speedy construction of railway extension herein provided for.

Section 3. This ordinance shall take effect immediately.

Finally Passed—Board of Supervisors, San Francisco, May 15, 1916.

Ayes: Supervisors Brandon, Deasy, Gallagher, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLeran, Mulvihill, Nelson, Nolan, Power, Suhr, Walsh, Welch, Wolfe.

J. S. DUNNIGAN, *Clerk.*

Approved, San Francisco, May 16, 1916.

JAMES ROLPH, JR., *Mayor.*

213 Due service and receipt of copy of the within Amended Bill of Complaint for Injunction is hereby admitted this 16th day of August, 1916.

PERCY V. LONG,
Attorney for Defendants and Respondents.

Endorsed: Filed Aug. 17, 1916. Walter B. Maling, Clerk.

214 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 280.

In Equity.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

versus

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

215 *Joint and Several Answer of the Defendants and Respondents, City and County of San Francisco, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser and Adolph Judell, Individually and as Members of and constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, to the Amended Bill of Complaint of Complainant.*

The above named defendants now and at all times hereafter, saving and reserving to themselves all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said amended bill of complaint contained, for answer thereunto, admit, deny, allege and say as follows:

I.

Said defendants and respondents admit the allegations contained in paragraph I of said amended bill of complaint.

II.

Said defendants and respondents admit the allegations contained in paragraph II of said amended bill of complaint, save and except that they are and each of them is without knowledge as to the proportion of the population of the City of San Francisco which respectively occupy the northeasterly part of the territory of said City and the other portions thereof.

III.

Said defendants and respondents admit the allegations contained in paragraph III of said amended bill of complaint.

216 IV.

Said defendants and respondents admit the allegations contained in paragraph IV of said amended bill of complaint.

V.

Said defendants and respondents admit the allegations contained in paragraph V of said amended bill of complaint.

VI.

Said defendants and respondents admit the allegations contained in paragraph VI of said amended bill of complaint, except that said defendants are and each of them is without knowledge of the amount of taxes or license fees paid by or assessed against said complainant for the respective purposes and at the respective times set forth in said paragraph VI of said amended bill of complaint.

VII.

Said defendants and respondents admit the allegations contained in paragraph VII of said amended bill of complaint, except that they deny that the amendment of Section 1 of Order No. 1514 in said paragraph of said amended bill of complaint referred to, made the terms of said original or amended order run for fifty (50) years from and after the date of the passage thereof; they further deny that the passage of Order No. 1676 in said paragraph of said amended bill of complaint referred to had the effect alleged in said paragraph and they hereby refer to said original and amended order for the force and effect thereof.

VIII.

Said defendants and respondents admit the allegations contained in paragraph VIII of said amended bill of complaint.

IX.

Said defendants and respondents admit the allegations contained in paragraph IX of said amended bill of complaint.

217 X.

Said defendants and respondents admit the allegations contained in paragraph X of said amended bill of complaint.

XI.

Said defendants and respondents admit the allegations contained in paragraph XI of said amended bill of complaint.

XII.

Said defendants and respondents admit the allegations contained in paragraph XII of said amended bill of complaint.

XIII.

Said defendants and respondents admit the allegations contained in paragraph XIII of said amended bill of complaint.

XIV.

Said defendants and respondents admit the allegations contained in paragraph XIV of said amended bill of complaint.

XV.

Said defendants and respondents admit the allegations contained in paragraph XV of said amended bill of complaint, except as follows:

They deny that complainant was at the time of the commencement of this action or ever since has been or now is maintaining or operating the several lines of street railway described in said paragraph XV of said amended bill of complaint or any of them in accordance with the terms or conditions of the franchises which are alleged and set forth in said amended bill of complaint, or any of them.

They deny that the system of street railways as now existing and in operation by complainant serves the entire population of the City and County of San Francisco, and on the contrary they allege that a large part of the population of said City and County of San Francisco and particularly that portion of said population living in the
218 outlying districts of said City and County is without necessary street railway service; and in that behalf they allege that complainant has refused and still refuses to so extend its system of street railway lines as to furnish adequate service to the people of the City and County of San Francisco, and that the growth of said City and County has been retarded and is *not* retarded by reason of the fact that its people have not been and are not now furnished with adequate or sufficient street railway service.

XVI.

Answering paragraph XVI of said amended bill of complaint, said defendants and respondents deny that the franchises, grants, privileges or rights-of-way referred to in said paragraph XVI were granted or accepted upon any conditions or provisions other than such as are contained in said franchises and in the laws of the State of California.

Further answering said paragraph of said amended bill of complaint, said defendants and respondents allege that Section 499 of

the Civil Code of the State of California which is set forth in said paragraph of said amended bill of complaint was amended by the Legislature of the State of California in 1891 to read as follows:

"Two lines of street-railway operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

Said defendants and respondents further allege that said section of said Civil Code was again amended by the Legislature of the State of California in 1907 to read as follows:

"Two or more lines of street railway, operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such lease or contract, upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly; but in no case shall a company owning or operating one line of street
219 railway be permitted to condemn the right to occupy and use the same street or tracks for a distance of more than five blocks consecutively. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Said defendants and respondents further allege that said section of said Civil Code of the State of California was again amended by the Legislature of the State of California in 1911, to read as follows:

"The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways, but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecutive blocks without the consent of the person or company occupying said portion of the street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly; provided that any incorporated city, city and county, or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such oc-

cupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Said defendants and respondents further allege that said Section 499 of the Civil Code of the State of California as amended in 1911 as hereinabove set forth has been in full force and effect sice said last named date and is now in full force and effect.

220

XVII.

Said defendants and respondents admit the allegations contained in paragraph XVII of said amended bill of complaint.

XVIII.

Said defendants and respondents admit the allegations contained in paragraph XVIII of said amended bill of complaint.

XIX.

Said defendants and respondents admit the allegations contained in paragraph XIX of said amended bill of complaint.

XX.

Said defendants and respondents admit the allegations contained in paragraph XX of said amended bill of complaint.

XXI.

Said defendants and respondents admit the allegations contained in paragraph XXI of said amended bill of complaint.

XXII.

Said defendants and respondents admit the allegations contained in paragraph XXII of said amended bill of complaint.

XXIII.

Said defendants and respondents admit the allegations contained in paragraph XXIII of said amended bill of complaint, except as follows:

Said defendants and respondents are and each of them is without nowledge as to the number of passengers which are daily carried pon the Market Street lines of complainant upon transfers or otherise, or the number of passengers that are carried upon the lines of mplainant upon transfers issued from the said Market Street lines.

21 XXIV.

Answering paragraph XXIV of said amended bill of complaint, ese defendants and respondents deny that the so called double loop tuate at the city front at the intersection of Market Street and the mbarcadero belongs to complainant exclusively and on the conary allege that said double loop belongs to complainant and the dendant, City and County of San Francisco, jointly, and in that behalf these defendants and respondents further allege that said double op is situate upon property belonging to the State of California hich said property is under the care, custody and control of the tate Board of Harbor Commissioners of said State; that said loop is aintained by the complainant and the defendant, City and County f San Francisco, jointly, under a revocable license from said State oard of Harbor Commissioners from month to month and that said tate Board of Harbor Commissioners have established as one of the nditions of the maintenance of said double loop that no further nes of cars shall use the same than are now being used thereon with-t the express permission of said Board.

Further answering said paragraph XXIV said defendants and reondents further allege that the defendant, City and County of San rancisco, has already laid and is now maintaining upon Market reet from Kearny Street to the Embarcadero in the City and County f San Francisco, which is a distance of more than five blocks on larket Street, the tracks for its Municipal Railway System, and is ow operating said system on said tracks for more than five blocks y electricity and by means of the overhead trolley system. Said acks which have heretofore been laid and are owned by said dendant, City and County of San Francisco, were at the time of the mmencement of this action and for more than one year prior ereto being used and the same have ever since been used and are now being used by complainant and the said defendant, City
22 and County of San Francisco jointly under the terms of a certain agreement made and entered into between the said mplainant and said defendant, City and County of San Francisco, nd the Sutter Street Railway Company on November 19, 1912, herein and whereby for certain considerations expressed in said greement it was agreed by complainant that the City and County f San Francisco should, without objection on the part of complainnt or said Sutter Street Railway Company, operate a street railway n Market Street from Kearny Street to the Embarcadero. Paraaph II of said agreement reads as follows:

"United Railroads of San Francisco hereby waives its right to obct to the use by the City and County of San Francisco of Market reet from Geary Street to the City Front under the provisions of

Sec. 5 of Order No. 1514 of the Board of Supervisors of the City and County of San Francisco, and under the provisions of Section 499 of the Civil Code of the State of California, and hereby consents to the operation of said Municipal Railway by the City and County of San Francisco on Market Street from Geary Street to the City Front, as herein stipulated. By accepting the waiver of United Railroads of San Francisco of right to object to the use by the City and County of San Francisco, of Market Street from Geary Street to the City Front, and by accepting the consent of said United Railroads of San Francisco to the operation of said Municipal Railway on Market Street, it is expressly understood and agreed by the parties hereto that the City and County of San Francisco does not admit the necessity of such waiver or consent, or the right of said United Railroads of San Francisco to object to said use of said Market Street, from Geary Street to the City Front for a Municipal Railway, but, on the contrary the City and County of San Francisco claims that regardless of such waiver and consent, and regardless of the provisions of Sec. 5 of said Order No. 1514 and of Sec. No. 499 of the Civil Code of the State of California, it has the legal right to operate said Municipal Railway on Market Street, as aforesaid, from Geary Street to the City Front. The Sutter Street Railway Company does not now object, and never will object, and concedes it has no right to object to the use by the City, of, Market Street from Geary Street to the City Front, or to the use of the outer track on Market Street, from Sutter Street to the City Front for the operation of said Municipal Railway."

XXV.

Said defendants and respondents admit the allegations contained in paragraph XXV of said amended bill of complaint, except as follows:

They deny that all persons entering or leaving San Fran-
223 cisco who use street cars for such purpose use the Market Street lines of complainant, and on the contrary allege that at least twenty-five per cent of said persons use the street cars and lines operated by the defendant, City and County of San Francisco.

XXVI.

Said defendants and respondents admit the allegations contained in paragraph XXVI of said amended bill of complaint.

XXVII.

Said defendants and respondents admit the allegations contained in paragraph XXVII of said amended bill of complaint, except as follows:

They deny that the cars upon the outer tracks on Market Street between Geary Street and the Embarcadero cover or blanket the cars on the inner tracks upon said street, or that said cars on said outer tracks make ingress or egress from the cars on the inner tracks dif-

ficult or dangerous or impossible. They deny that said cars on the outer tracks completely or otherwise blanket the cars on the inner tracks; they deny that the cars on the two southerly or inbound tracks on Market Street become so congested as to extend several blocks from the Embarcadero; they deny that on account of the delays described in said paragraph XXVII of said amended bill of complaint, it is impossible for persons to board or alight from the cars on the center tracks on said street; they deny that if outer tracks should be constructed on Market Street as proposed by the defendant, City and County of San Francisco, any condition of blanketing, or any condition which would prevent ingress or egress from the cars on the inner tracks upon said street would be caused or exist.

XXVIII.

Said defendants and respondents admit the allegations contained in paragraph XXVIII of said amended bill of complaint, except as follows:

224 They deny that during the regular business hours of the day, Market Street between the Embarcadero and Gough street is crowded with vehicles of all sorts and descriptions, and on the contrary allege that under ordinances and traffic regulations prescribed by the City and County of San Francisco and now in force and effect, certain classes of vehicles are denied the use of said Market Street during certain hours of the day; they deny that under the conditions set forth in said amended bill of complaint, there is produced a state of extreme congestion in Market Street between the Embarcadero and Gough Sreet and on the contrary allege that whatever congestion exists is limited to the distance on Market Street from the Embarcadero to Sixth Street, and that no congestion of vehicular or other traffic exists upon Market Street between Sixth Street and Gough Street, and in that behalf they further allege that whatever congestion of traffic exists upon any portion of Market Street is no greater than is usual, customary and necessary in a city of the size and situation of the City of San Francisco.

Said defendants and respondents further allege that the safety stations referred to in paragraph XXVIII of said amended bill of complaint which are situate on Market Street at First Street, Montgomery Street and Third Street are so situated at points upon Market Street where four tracks are already in existence and are being used for street car traffic; and that said safety stations are situate at the junction of the above mentioned streets with Market Street at points where there is abundant space for the location of the same without causing a congestion of traffic; in that behalf said defendants and respondents further allege that if said four tracks are laid throughout the length of Market Street as proposed by the defendant, City and County of San Francisco, safety stations can be so placed at the junction

225 of intersecting streets as not to interfere with vehicular or pedestrian traffic upon said street.

Said defendants deny that the space between such safety stations

and the curbs of said Market Street is too narrow to accommodate the present traffic on said street, or that great or any congestion is produced thereby, or that persons desiring to go to or from said safety stations are in danger from congested traffic at such points. They further deny that if additional tracks should be laid on the outside of the present tracks as proposed, such safety stations would have to be removed altogether or set back between the outer rails of such additional tracks and the curb, and on the contrary allege that said safety stations can be conveniently placed at the intersection of the streets with Market Street as hereinabove set forth; they deny that traffic on Market Street would have to be diverted to the space occupied by the four tracks in the event of the construction of said four tracks throughout the length of Market Street, or that such conditions would increase the danger of the operation of cars or other vehicles, or would retard or interfere with the progress of cars on said street; they deny that under the conditions above described, pedestrians would be obliged to stand in the street without the protection afforded by safety stations while waiting to board street cars.

XXIX.

Said defendants and respondents admit the allegations contained in paragraph XXIX of said amended bill of complaint, except as follows:

They deny that if the City and County of San Francisco should operate additional cars upon the outer tracks on Market Street, the congestion around the ferry loops would necessarily be increased, and on the contrary allege that said congestion could be lessened by the establishment of an additional loop at said ferry station or by
226 other proper and reasonable means.

XXX.

Said defendants and respondents admit the allegations contained in paragraph XXX of said amended bill of complaint, except as follows:

They deny that the conditions described in said paragraph XXX of said amended bill of complaint would make it necessary for the traffic therein described to use the space between the outer rails of the outer tracks and the curbs on said Market Street, or the space between the outer rails of the outer tracks on said street, or that said conditions would increase the danger either to vehicles or cars, or persons occupying either of the same, or pedestrians crossing Market Street, or would interfere with the proper operation of said cars; on the contrary, they allege that the safety of traffic on said streets could reasonably be increased, notwithstanding the existence of four tracks thereon, by the diversion of vehicular traffic from such street.

XXXI.

Said defendants and respondents admit the allegations contained in paragraph XXXI of said amended bill of complaint, except as follows:

They allege that they are and each of them is without knowledge as to the number of passengers carried by plaintiff on its Market Street line and as to the receipts by complainant for the carriage of said passengers. They deny that passengers boarding or alighting from complainant's cars would be in danger from the cars of the defendant, City and County of San Francisco, operated on the outer tracks; they allege that they are and each of them is without knowledge as to the number of passengers or amount of patronage which would be lost to complainant by reason of the construction of the aforesaid four tracks upon Market Street and allege that any
227 such loss of passengers or patronage is entirely speculative and is impossible of ascertainment; they deny that the carrying capacity of Market Street has been or is now exceeded; they deny that if the additional lines described in said amended bill of complaint should be constructed and operated by the defendant, City and County of San Francisco, the burden placed upon Market Street would be so increased as to result in any injury to the complainant, or as to amount to a confiscation of any property of complainant.

XXXII.

Said defendants and respondents admit the allegations contained in paragraph XXXII of said amended bill of complaint.

XXXIII.

Said defendants and respondents admit the allegations contained in paragraph XXXIII of said amended bill of complaint.

XXXIV.

Answering paragraph XXXIV of said amended bill of complaint, said defendants and respondents deny that the defendant, City and County of San Francisco, and the Board of Supervisors thereof have not undertaken to institute any proceedings for the purpose of acquiring a part of the properties of the United Railroads of San Francisco, as described and set forth in said amended bill of complaint. They deny that said City and County of San Francisco has not, through its Board of Supervisors, instituted a proceeding or undertaking to acquire any street railway of complainant as required by Article XII Section 2 of the Charter of the City and County of San Francisco set forth in said paragraph, or by any of the amendments thereof approved by the Legislature of the State of California on February 5, 1903, November 23, 1907, February 17, 1911, March 28 1913, or April 1, 1915. In this behalf, they allege that on the 28th day of April, 1913, the Board of Supervisors of said City and
228 County of San Francisco duly and regularly passed Resolution No. 10,138, New Series, which resolution was approved by the Mayor of the City and County of San Francisco on the 30th day of April, 1913. Said resolution was never repealed or set aside and upon the passage thereof the Clerk of the Board of Supervisors did,

as directed in Section 3 thereof, cause a copy of said resolution to be mailed to the Presidio and Ferries Railroad Company, the California Street Railway Company and the United Railroads of San Francisco, addressed to them to their respective places of business in San Francisco, California. Said resolution was a part of the proceedings and was one of the resolutions and ordinances duly and regularly passed by the Board of Supervisors having for their purpose the authorization by the electors of the City and County of San Francisco of a bond issue for the construction of street railroads by the City and County of San Francisco over certain streets of said City and County, among said streets being the following: on Van Ness Avenue and from said Avenue along connecting streets to Church Street and along Church Street to convenient terminals. (A true, full and correct copy of said resolution is hereunto annexed and marked "Exhibit A" and by this reference is made a part hereof with like effect as if the same had been fully set forth herein.)

They deny that the City and County of San Francisco, through its Board of Supervisors, or otherwise has not offered to make any arrangement or contract with complainant for the use of the track or tracks of complainant on Church Street from Market Street to Sixteenth Street. On the contrary, they allege that the Board of Public Works of the City and County of San Francisco did request complainant to fix a value upon said tracks on Church Street from Market Street to Sixteenth Street for the purpose that the City should
229 acquire a half interest therein and use and operate a street railroad over the same in joint use and ownership with complainant. Thereafter complainant did fix a value on said tracks and said Board of Public Works did agree thereto but thereafter complainant refused to enter into any agreement, contract or sale with reference thereto which would permit the City and County of San Francisco to operate a street railroad over said tracks in joint use and ownership of said tracks with the complainant.

They deny that the defendants in the above entitled action have not offered to make any compensation to complainant for connecting the municipal railway tracks on Church Street with the tracks of complainant at Church and Sixteenth Streets. In this behalf they allege that the Public Utilities Committee of the Board of Supervisors, which Committee, by the rules of the Board of Supervisors was authorized to deal and negotiate with the complainant for the use of the tracks belonging to complainant on Church Street from Market to Sixteenth Streets, offered to pay to said complainant one-half of the value thereof in consideration that complainant permit the City and County of San Francisco to operate its municipal railway over said tracks in joint use and ownership with complainant, but that said complainant refused to accept said compensation or permit the City and County of San Francisco to so operate its municipal railway over said tracks.

XXXV.

Said defendants and respondents admit the allegations contained in Paragraph XXXV of said amended bill of complaint, except as follows:

They deny that the construction of four tracks on Market Street between Sixteenth Street and Van Ness Avenue, or between Seventeenth Street and Third Street will cause the same conditions
230 to prevail with regard to the difficulty and danger of entering and leaving cars operated on the center track as now prevail on Market Street between Geary Street and the Embarcadero for the reason that the congestion of traffic on Market Street between Geary Street and the Embarcadero is much greater than the congestion of traffic on Market Street from Third Street to Seventeenth Street; they deny that if said four tracks are constructed the cars of the defendant, City and County of San Francisco, will blanket the cars of complainant on Church Street between Sixteenth and Market Streets, or will blanket the cars of complainant on Market Street from Church Street to Van Ness Avenue or from Seventeenth Street to or across Third Street. They deny that the construction of said four tracks or the operation of cars thereon will interfere with or cause any danger to passengers desiring to board or alight the cars of complainant on said streets, or will prevent complainant from enjoying the full use of its franchises on said streets (if any it has) or will impede or delay the progress of complainant's said cars or cause increased or continuous expense of operation to complainant, or otherwise interfere with the operation of complainant's cars over said street, or with the full exercise and enjoyment of its said franchises (if any it has).

Said defendants allege that they are and each of them is without knowledge as to the amount of increase of expense, or loss of income which may result to complainant by reason of the construction of said four tracks upon Market Street and the operation of cars thereon, and in that behalf allege that such increase of expense and loss of income are entirely speculative and impossible of ascertainment.

XXXVI.

Answering paragraph XXXVI of said amended complaint, said defendants and respondents deny that the operation of the
231 cars of said defendant, City and County of San Francisco over the lines described in said paragraph of said bill of complaint will interfere with or disarrange the time schedules or headway of the cars of complainant operating over said streets, or will impede or delay the operation of said cars on said streets, or will cause congestion of cars or traffic upon said streets, or will render it impracticable for complainant to operate its said cars according to its established schedules and headways, or will interfere with the service which complainant desires to give or does give to the public

of the City and County of San Francisco upon its said railway, or that the operation of said cars by said defendant, City and County of San Francisco, will increase the operating expenses of complainant's said cars.

Said defendants further deny that said City and County of San Francisco will operate its said cars without regard to the time schedules and headways established by complainant for the operation of its cars over the streets described in said paragraph of said amended bill of complaint, and on the contrary allege that the cars of complainant and the cars of the defendant, City and County of San Francisco, can by joint arrangement between said parties be so operated under such headway and schedules as not to interfere with each other.

XXXVII.

Answering paragraph XXXVII of said amended bill of complaint, said defendants and respondents allege that they are and each of them is without knowledge as to the issuance of bonds and the security therefor, and other matters alleged in said paragraph of said amended bill of complaint.

XXXVIII.

Answering paragraph XXXVIII of said amended bill of complaint, said defendants and respondents allege that they are
232 and each of them is without knowledge of the amount of outstanding bonds of complainant, and as to the other matters alleged in said paragraph.

XXXIX.

Said defendants and respondents admit the allegations contained in paragraph XXXIX of said amended bill of complaint, except as follows:

They deny that the construction of the street railways and tracks by the City and County of San Francisco as described in said paragraph of said amended bill of complaint will cause any damage to complainant, or will occasion any grievance or injury to complainant. They deny that plaintiff has no plain, speedy or adequate remedy at law, or that any loss or damage which is cognizable by this Honorable Court sitting in equity will result to complainant by reason of the matters and things alleged in said amended bill of complaint.

XL.

Answering paragraph XL of said amended bill of complaint, these defendants and respondents deny that any acts of said defendants and respondents or any of them as set forth in said amended bill of complaint will impair the obligation of any contract entered into by the State of California or by the City and

County of San Francisco, or will impair the obligation of any grant or franchise to the complainant which is described in said amended bill of complaint, or will constitute any taking of the property of complainant without due process of law or in violation of any provision of the Constitution of the United States of America.

Said defendants and respondents further deny that any act of said defendants and respondents or any of them as set forth in said amended bill of complaint will depreciate the value of complainant's property, or will decrease the value of its bonds in such a
233 manner as to warrant any relief to complainant in this action or under its aforesaid amended bill of complaint.

XLI.

Said defendants and respondents admit the allegations contained in paragraph XLI of said amended bill of complaint, except as follows:

They deny that the Market Street Railway Company of San Francisco, or the Market Street Railway Company or complainant, the United Railroads of San Francisco accepted any franchise, rights-of-way or privileges granted under Orders No. 1514, 1676 or 2858 described in said amended bill of complaint in reliance upon any contract with the City and County of San Francisco or the State of California, except as such contract may be contained in the terms of said orders. They further deny that any of the aforesaid companies did expend any sums of money in reliance upon the good faith of the State of California or of the City and County of San Francisco, or in reliance upon any clause in said contracts except in reliance upon the terms of the aforesaid orders as the same appear therein.

They deny that complainant has expended any sums of money in repairs or reconstruction of any tracks or railway in reliance upon any contract with the State of California or with the City and County of San Francisco, except upon the terms of the said orders hereinabove referred to. They deny that the defendant, City and County of San Francisco has threatened or does threaten to run through cars from the terminus of its proposed Church street line at Church and Thirtieth Streets, thence along Church Street to Market Street, thence along Market to Van Ness Avenue, thence along Van Ness Avenue to Geary Street, thence along Geary Street to Market and Kearny Streets and thence along Market
234 Street to the Embarcadero. They allege that such proposed continuous route has not been determined upon by said City and County of San Francisco.

XLII.

Answering paragraph XLII of said amended bill of complaint, said defendants and respondents deny that the City and County of San Francisco is seeking to or will impair the obligation of any contract of complainant or of any of the railway corporations named

in said amended bill of complaint with the State of California or the City and County of San Francisco, or is seeking to, or will impair the obligation of any contract of complainant or any of the above named railway corporations with the State of California or the City and County of San Francisco by becoming a competitor in the business of owning and operating a street railway along any streets in the said City and County of San Francisco; in that behalf said defendants and respondents allege that the City and County of San Francisco by becoming a competitor or complainant in the business of owning and operating a street railway in said City and County of San Francisco will not impair the obligation of any contract between said State of California or the City and County of San Francisco and complainant.

XLIII.

Answering the allegations contained in paragraph XLIII of said amended bill of complaint, said defendants and respondents allege that they are and each of them is without knowledge as to the belief or reliance had by Market Street Railway Company of San Francisco or Market Street Railway Company or the complainant, United Railroads of San Francisco, at the time said Companies and each of them accepted the rights, privileges and franchises described in said amended bill of complaint.

Said defendants and respondents deny that the City and
235 County of San Francisco or the State of California ever knew that the predecessors in interest of complainant in expending moneys for the construction or equipment of the railroads described in said amended bill of complaint would not, or that the complainant would not have expended money in the construction or equipment of said railroads if said predecessors in interest and complainant or any of them had believed that the City and County of San Francisco would have undertaken to construct and operate a railroad along the streets in said amended bill of complaint referred to and thus become a competitor of complainant in the street railway business along said streets as aforesaid.

XLIV.

Answering paragraph XLIV of said amended bill of complaint, said defendants and respondents deny that any property of complainant will be damaged in any sum whatsoever in any such manner as to confer jurisdiction upon this Honorable Court or to entitle complainant to any relief herein by reason of any of the matters or things alleged in said amended bill of complaint.

Affirmative Defenses.

Further answering said amended bill of complaint, and as further defenses to the alleged cause of action therein set forth, said defendants and respondents allege as follows:

I.

That it appears by complainant's showing in said amended bill of complaint that it is not entitled to the relief prayed for by said amended bill of complaint, or to any relief against said
236 defendants and respondents, or any of them.

II.

That it appears from the allegations of said amended bill of complaint that the same does not state facts sufficient to constitute a valid cause of action in equity in this Honorable Court.

III.

That it appears from the allegations of said amended bill of complaint that said complainant is not entitled to the issuance of any writ of injunction as therein prayed for.

IV.

That it appears from the allegations contained in said amended bill of complaint that this Honorable Court has no jurisdiction of the alleged cause of action set forth in said amended bill of complaint.

V.

That it appears from the allegations contained in said amended bill of complaint that none of the matters or things or acts of any of the defendants set forth in the amended bill of complaint amount to or constitute an impairment of the obligation of any contract entered into by or between complainant or its predecessors in interest, and any of the defendants and respondents herein.

VI.

That it appears by the allegations contained in said amended bill of complaint that complainant has not been deprived of any of its property or property rights without due process of law.

VII.

That it does not appear from the allegations contained in said amended bill of complaint that any of the acts, matters or things therein set forth are in violation of, or contrary to any of
237 the provisions of the Constitution of the United States of America or any of the amendments thereto.

VIII.

That it appears from the allegations contained in said amended bill of complaint that no Federal question is involved herein and that the above entitled Honorable Court has no jurisdiction of said cause of action for that reason.

IX.

Said defendants and respondents further allege that the population of the City and County of San Francisco is rapidly increasing as set forth in plaintiff's said amended bill of complaint.

That portions of said City and County of San Francisco are without any street railway service whatever; that other portions of said City and County of San Francisco are without adequate service and the service heretofore furnished to such portions of said City and County has been and is now entirely inadequate to the needs of the persons residing in such portions of said City and County.

That prior to the year 1912, the complainant, United Railroads of San Francisco owned and operated all of the street railways then in operation in said City and County of San Francisco with the exception of two short lines of a total length of not to exceed twenty miles; that prior to said time, frequent demands had been made by the citizens and residents of said City and County of San Francisco upon said United Railroads of San Francisco to furnish additional and adequate street car service for said City and County and its inhabitants. That said United Railroads of San Francisco, complainant herein refused for a number of years prior to said year of 1912 to make any extensions of its existing system of street railways in said City and County of San Francisco, or to furnish any additional street railway service to said City or its inhabitants or to ap-
238 ply for or accept any additional franchises for that purpose.

That the growth of said City and County of San Francisco has been greatly retarded and is now greatly retarded by reason of inadequate street car service therein. That in order to meet the demands of its citizens and residents for adequate street car service, said City and County of San Francisco in the year 1912 began the construction of a municipal street car system; said system began operation in the year 1912, since which time the same has been continuously operated and from time to time has been extended by purchase of existing street railway lines and construction of new ones. At the time of the filing of the complaint in this action said defendant, City and County of San Francisco, owned and operated a Municipal street car system upon the streets of San Francisco of a total length of approximately forty-five (45) miles, and said City and County of San Francisco is now operating the same.

The street railroads proposed to be constructed and operated by said defendant, City and County of San Francisco as set forth in plaintiff's amended bill of complaint, and the construction of which said complainant seeks to enjoin are extensions of the existing street

railway system now in operation by said defendant, City and County of San Francisco, and said extensions are imperatively demanded and presently necessary in order to meet the requirements of the residents of said City and County of San Francisco.

The right of said City and County of San Francisco to construct and operate said municipal railway under the laws of the State of California has been affirmed by the Supreme Court of the State of California in the case of Platt against the City and County of San Francisco which is reported in Volume 158 of the Official Reports of said Court at page 74.

239 Owing to the peculiar situation of Market Street, as alleged in paragraph XXII of the amended bill of complaint, those sections of the City and County of San Francisco which are now without adequate street railroad service, and especially those sections that will be served by the lines of said Municipal Railway, the construction of which complainant seeks to enjoin, cannot be adequately or properly served with street railroad transportation unless said lines are brought into and down Market Street and additional tracks built upon Market Street from its westerly terminus to Kearny Street and there connecting with the tracks of the Municipal Railway system already constructed.

X.

Said defendants and respondents further allege that complainant herein was at the time of the commencement of this action, ever since has been and now is operating on Market Street in said City and County of San Francisco, without any right, authority, privilege or franchise so to do, many street railway cars which are run into said Market Street from other streets, to-wit: from Castro Street, Valencia Street, Haight Street, Hayes Street, McAllister Street and Eddy Street.

That whatever congestion of street car traffic exists upon Market Street and whatever damage has resulted or will result to complainant by reason of the facts alleged in said amended bill of complaint, if any, will be caused by the unauthorized and wrongful presence upon said Market Street of the cars in this paragraph referred to.

XI.

Said defendants and respondents further allege that complainant was not at the time of the commencement of this action, nor
240 has it been at any time since said date, nor is it now maintaining or operating any of the lines of street railway described in its said amended bill of complaint in accordance with the terms or conditions of the franchises which are alleged and set forth in said amended bill of complaint, or any of them.

Said defendants and respondents further deny all and all manner of unlawful acts whatsoever whereof they or any of them are in any wise, by the said amended bill of complaint, charged, all of which matters and things said defendants and respondents are and each of

them is ready and willing to prove as this Honorable Court shall direct.

Said defendants and respondents pray that the complainant be denied any relief herein and that they and each of them be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

City and County of San Francisco, a municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-Officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D.
Hynes and Oscar Hocks, individually and as members of and
241 constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a municipal corporation, defendants and respondents.

PERCY V. LONG,
City Attorney of the City and County of San Francisco, Solicitor for Defendants and Respondents.

THOS. E. HAVEN,
GEORGE LULL,
Of Counsel for Defendants and Respondents.

242 UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

Thomas A. Cashin, being duly sworn, deposes and says: I am one of the defendants and respondents named in the foregoing answer. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

THOMAS A. CASHIN.

Subscribed and sworn to before me this 21st day of August, 1916.

[SEAL.] A. J. NAGLE,
Notary Public in and for the City and County of San Francisco, State of California.

243 EXHIBIT "A."

Resolution No. 10138 (New Series).

Resolved, By the Board of Supervisors of the City and County of San Francisco as follows:

1. The Board of Supervisors of the City and County of San Francisco does hereby solicit offers for the sale to the City and County of San Francisco of any existing street railway or system of street railways operated over or upon any street within said City and County.

Any owner or owners of any such street railway or system of street railways are hereby invited to submit proposals or offers in writing to the Board of Supervisors for the sale of the same to the City and County, and such proposals shall be filed with the Clerk of the Board of Supervisors at any time prior to the second day of June, 1913.

And it is hereby announced and declared to be the purpose and intention of the Board of Supervisors to consider any and all proposals or offers that may be made for the sale of any street railway or system of street railways to the said City and County on said second day of June, 1913, and before submitting propositions to the electors for the acquisition by original construction or condemnation of such railway or system of street railways, in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof.

2. The Clerk of the Board of Supervisors is hereby directed to publish in the official newspaper for the period of ten days a notice in substantially the following form:

'*Notice Soliciting Offers for the Sale of Street Railways to the City and County.*

To the owner or owners of any street railroad or system of street railroads in the City and County of San Francisco:

You are hereby solicited and invited to submit to the Board of Supervisors of the City and County of San Francisco prior to the second day of June, 1913, an offer or offers in writing to sell to the said City and County any street railway or system of street railways, or any portion thereof, operated over or upon any street in the City and County, and that the Board of Supervisors will consider any and all such offers that may be submitted on the second day of June, 1913, at its regular meeting on said day.

This notice is given in compliance with the Charter of the City and County of San Francisco and of Resolution No. — (New Series) adopted —— —, 1913, and your attention is called to said resolution for further particulars.

Dated —— —, ——. —— ——, *Clerk.*'

3. The Clerk of said Board is hereby directed to cause a copy of the aforesaid notice to be mailed to the Presidio and Ferries Rail-

road Company, the California Street Railway Company and the United Railways of San Francisco, addressed to them at their places of business in San Francisco, California.

Adopted—Board of Supervisors, San Francisco, April 28, 1913.

244 Ayes: Supervisors Bancroft, Caglieri, A. J. Gallagher, G. E. Gallagher, Giannini, Hayden, Hilmer, Hocks, Jennings, Koshland, Mauzy, McCarthy, McLeran, Murdock, Murphy, Nolan, Payot, Vogelsang.

J. S. DUNNIGAN, *Clerk.*

Approved: San Francisco, April 30, 1913.

JAMES ROLPH, JR., *Mayor.*"

Rec'd a copy of within this 21st day of August, 1916.

GARRETT W. McENERNEY,
WM. M. ABBOTT, AND
WM. M. CANNON,
Solicitor- for Complainant.

Endorsed: Filed Aug. 21, 1916. Walter B. Maling, Clerk.

245 At a Stated Term, To wit: the July Term, A. D. 1916, of the District Court of the United States of America in and for the Northern District of California, Second Division, Held at the Court-room in the City and County of San Francisco, on Tuesday, the 22nd day of August, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable William H. Hunt, Circuit Judge, designated to hold and holding this Court.

Equity. 280.

UNITED RAILROADS OF SAN FRANCISCO

vs.

CITY AND COUNTY OF SAN FRANCISCO et als.

(*Order of Trial of August* 22, 1916.)

This suit came on this day for trial, Wm. M. Cannon and Wm. M. Abbott, Esqrs., appearing on behalf of plaintiff and Thos. E. Haven and George Lull, Esqrs., appearing as attorneys for defendants. Mr. Cannon made the opening statement on behalf of plaintiff and Mr. Haven made the opening statement on behalf of defendants. Ordered that George Lull may sign the original answer as an attorney for

defendants. Counsel for both sides made certain admissions and the further trial was ordered continued until to-morrow morning at 10 o'clock.

246 At a Stated Term, To wit: the July Term, A. D. 1916, of the District Court of the United States of America in and for the Northern District of California, Second Division, Held at the Court-room in the City and County of San Francisco, on Wednesday, the 23rd day of August, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable William H. Hunt, Circuit Judge, designated to hold and holding this Court.

Equity. 280.

UNITED RAILROADS OF SAN FRANCISCO
vs.
CITY AND COUNTY OF SAN FRANCISCO et als.

(*Order of Trial of August* 23, 1916.)

Counsel being present as heretofore the trial was resumed. Wm. Phul, John T. Pidwell and Henry T. Jones were sworn and testified on behalf of plaintiff and plaintiff introduced in evidence and filed its exhibits marked 1, 2, 3, 4 and 5 and plaintiff rested. A. S. Baldwin, Jos. A. Leonard, C. C. Young and M. M. O'Shaughnessey were sworn and testified on behalf of defendants and defendants introduced in evidence and filed their exhibit marked "A." Ordered that the further trial be continued to to-morrow morning at 10 o'clock.

247 At a Stated Term, To wit: the July Term, A. D. 1916, of the District Court of the United States of America in and for the Northern District of California, Second Division, Held at the Court-room in the City and County of San Francisco, on Thursday, the 24th day of August, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable William H. Hunt, Circuit Judge, designated to hold and holding this Court.

Equity. 280.

UNITED RAILROADS OF SAN FRANCISCO
vs.
CITY AND COUNTY OF SAN FRANCISCO et als.

(*Order of Trial of August* 24, 1916, *and Order Allowing Plaintiff to File Its Amendments, etc.*)

Counsel being present as heretofore, the trial was resumed. M. M. O'Shaughnessey, was recalled and Thos. A. Cashin and N. A. Eckart

were sworn and testified on behalf of defendants and defendants introduced in evidence and filed their exhibits marked "B" "C" "D" and "E." On cross-examination plaintiff introduced in evidence and filed its exhibits marked "6" "7" "8" "9" "10" "11" and "12." Ordered that defendant may amend its answer on the face thereof, by striking out the word "now" on line 6 at page 5 and substituting *thereof* the word "not." Defendants rested. In rebuttal Wm. Von Phul was recalled and Chas. L. Ayers was sworn and testified on behalf of plaintiff. Ordered that plaintiff may file its amendments to the amended bill and may amend its amended bill on the face thereof by adding the words "deprive complainant of the rights secured it by Art. 1, Sec. 10, of the Constitution of the United States, and will" after the word "will" on line 19 at page 41. The evidence being closed counsel made their arguments and the suit was sub-
248 mitted on briefs to be filed in 21 days, 15 days and 10 days.

249 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al., Defendants and Respondents.

Amendments to Amended Bill of Complaint for Injunction.

The complainant in the above entitled action, by leave of the Court first had an- obtained, makes and files the following amendments to its amended bill of complaint therein, to-wit:

I.

Paragraph XXXII of said amended bill is hereby amended so as to read as follows:

XXXII.

If the defendant City and County of San Francisco should lay and construct railroad tracks on Market Street as proposed it would be necessary for said City and County to cut the rails of the tracks of complainant on the following lines of complainant and to cross the tracks of said lines, to-wit: Castro Street tracks at their intersection with Market Street; Church Street tracks at the intersection of 16th and Church Streets; Market Street tracks at the intersection of

250 Church and Market Streets; Valencia Street tracks at the intersection of Valencia and Market Streets; Haight Street tracks at the intersection of Haight and Market Streets; Gough Street tracks at the intersection of Gough and Market Streets; 12th Street tracks at the intersection of 12th and Market Streets; Market Street tracks at the intersection of Van Ness Avenue and Market Street; 10th and Polk Street tracks at the intersection of Polk and Market Streets and at the intersection of 10th and Market Streets; Hayes Street tracks at the intersection of Hayes and Market Streets; 9th and Larkin Streets tracks at the intersection of Market and Larkin Streets and Market and 9th Streets; 8th Street tracks at the intersection of 8th and Market Streets; 6th and Taylor Streets tracks at the intersection of Market and Taylor Streets, and at the intersection of 6th and Market Streets; 5th Street tracks at the intersection of 5th and Market Streets; 4th and Ellis Street- tracks at the intersection of Ellis and Market Streets and at the intersection of Market and 4th Streets; 3rd and Kearny Streets tracks at the intersection of Kearny and Market Streets and at the intersection of Market and Third Streets.

II.

A new section is hereby added to said amended bill numbered XXXI½, and reading as follows:

XXXI½.

Church Street between Market and 16th Streets, a distance of two blocks, is 82½ feet in width. Each of the sidewalks thereon is 15 feet in width. The distance between the curbs is 52½ feet. The center of said street is at present occupied by the double track street railway of complainant. The space between said tracks is about .6 feet and the guage of each of said tracks is 4 feet 8½ inches.
251 The overhang of the cars operated on said street is about 2 feet. If the defendant City and County should construct other tracks on said part of Church Street between the tracks of complainant and the curbs there would be only six feet, or thereabouts, of space between cars operated on said outer tracks and said curbs, and said space would be altogether insufficient to accommodate the traffic on said street, and such traffic would be compelled to use the space occupied by the tracks of complainant. The addition of two tracks in that portion of Church Street and the narrow space between cars and curbs as aforesaid would tend to produce, and would produce, such a congestion of traffic as would materially interfere with the operation of complainant's cars and cause frequent delays and an increased operating expense.

III.

A new section is hereby added to said amended bill, numbered XVI½, and reading as follows:

XVI½.

On or about the 11th day of June, 1906, the Board of Supervisors of said City and County of San Francisco passed an ordinance known and designated as Ordinance No. 20 (New Series) entitled, "An Ordinance Authorizing and Directing the United Railroads of San Francisco to Operate all of their several Cable Railway lines, so far as grades will permit, by electricity, by means of the so-called overhead trolley system," which ordinance was thereafter on the 12th day of June, 1906, approved by the Mayor of said City and County of San Francisco, said ordinance was and is in the words and figures following, to-wit:

252 Ordinance No. 20 (New Series).

An Ordinance Authorizing and Directing the United Railroads of San Francisco to Operate all of Their Several Cable Railway Lines, so far as Grades will Permit, by Electricity, by Means of the So-called Overhead Trolley System.

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The United Railroads of San Francisco is hereby authorized and directed to operate all of its several cable railway lines and franchises, so far as grades will permit, by electricity, by means of the so-called overhead trolley system, and to erect the necessary poles and string the necessary wires and provide and use the proper and necessary means to that end.

Section 2. The work of installing said electrical equipment shall be immediately begun and shall be prosecuted with all possible expedition and without interruption until said cable lines and franchises, so far as grades will permit, are equipped for electric operation.

Section 3. Said electrical equipment shall be first class in every particular and shall include highly ornamental poles along Market Street from the Ferry to Valencia Street, and also Sutter Street from Market street to the west line of Van Ness Avenue, upon each side of which said poles on Market street and upon every alternate pole on Sutter street, said United Railroads shall install and maintain, at its own expense and without any expense to the city, electric lights for the lighting of said Market street from the Ferry to Valencia street, and of said Sutter street from Market street to the west line of Van Ness Avenue.

First-class iron poles shall be used in the permanent construction of all of said lines, and the feed wires shall be carried underground on Market street from the Ferry to Valencia street, and on Sutter street from Market street to the west side of Van Ness Avenue. Provided that temporary construction may be employed until material can be obtained for permanent construction in accordance with the

terms of this ordinance, such material to be obtained with all possible expedition.

Section 4. Nothing in this ordinance contained shall be so construed as to extend any franchise or franchises now held by said United Railroads beyond the time limited in any of said franchises, respectively, nor are any rights granted or intended to be granted hereby, save and except alone the rights above specifically set forth and described; it being distinctly understood that all of the existing rights, duties, obligations and contracts of the said United Railroads of San Francisco, and the said city and county of San Francisco, including the payment of all percentages of receipts now provided for, shall remain unchanged and unaffected by reason of anything herein contained, save and except that said several cable railway lines of said United Railroads of San Francisco may and shall be hereafter operated by electricity in the manner hereinbefore set forth.

In Board of Supervisors.

San Francisco, June 11, 1906.

After having been published five successive days, according
253 to law, taken up and finally passed by the following vote:
Ayes—Supervisors Boxton, Coffey, Coleman, Davis, Duffey, Furey, Gallagher, Harrigan, Kelly, Lonergan, Mamlock, McGushin, Nicholas, Phillips, Rea, Sanderson, Walsh, Wilson.

GEO. B. KEANE, *Clerk.*

Approved, San Francisco, June 12, 1906.

E. E. SCHMITZ,
Mayor and ex-Officio President of the Board of Supervisors.

Pursuant to the terms of said ordinance and in accordance with the authority and directions therein contained the complainant, at great expense, forthwith reconstructed all of its street railway lines on the streets described in Ordinance No. 1514, as required by said Ordinance No. 20 (New Series), and forthwith complied with all of the other terms, conditions and provisions and requirements of said ordinance. Said lines had theretofore been operated as cable lines, and continuously from and after the time of such reconstruction the complainant has operated, and now operates all of such lines by electricity by means of the overhead trolley. The cost of such reconstruction was in excess of $2,500,000.

Wherefore, complainant prays judgment in accordance with the prayer of the amended bill of complaint herein.

GARRET W. McENERNEY,
WM. M. ABBOTT, AND
WM. M. CANNON,
Solicitors for the Above-named Complainant.

254 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Jesse W. Lilienthal, being first duly sworn according to law, deposes and says: That he is an officer, to-wit, President, of the Complainant United Railroads of San Francisco, named in the foregoing Amendments to the Amended Bill of Complaint for injunction, and makes this affidavit as such President on behalf of such complainant corporation; that he has read the foregoing amendments to the amended bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated upon information or belief, and as to those matters he believes it to be true.

JESSE W. LILIENTHAL.

Subscribed and sworn to before me this 24th day of August, A. D. 1916.

[NOTARIAL SEAL.] CHARLES E. REITH,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Filed Aug. 24, 1916. Walter B. Maling, Clerk.

255 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al., Defendants and Respondents.

Joint and Several Answer of the Defendants and Respondents to Amendments to Amended Bill of Complaint.

The defendants and respondents in the above-entitled action, and each of them, for their joint and several answer to the amendments of complainant to its amended bill of complaint in said action, which amendments were filed in said action on August 24, 1916, admit, deny and allege as follows:

I.

Said defendants and respondents admit the allegations contained in paragraph XXXII of said amended bill of complaint as last amended, except as follows:

They deny that if the defendant City and County of San Francisco should lay or construct railroad tracks on Market Street,
256 as proposed, it would be necessary for said City and County to cut the rails of the tracks of complainant on Church Street at the intersection of Sixteenth and Church streets. On the contrary they allege that tracks laid on Market Street, as proposed, would not intersect or interfere with the Church Street tracks of complainant at the intersection of Sixteenth and Church streets as alleged in said last amendment.

II.

Answering paragraph XXXI½ of said amended bill of complaint said defendants and respondents admit the allegations therein contained, except as follows:

They admit that the sidewalks as at present laid upon Church Street are fifteen feet in width. They allege, however, that on the 24th day of May, 1916, the Board of Supervisors of the City and County of San Francisco duly and regularly passed and adopted Ordinance No. 3753, New Series, in and by which the legal and official width of the said sidewalks on Church Street was reduced from fifteen feet to ten feet.

They further allege that the legal and official width of said sidewalks is now ten feet and that said City and County of San Francisco is about to proceed to cause the width of said sidewalks to be reduced from fifteen feet to ten feet and that said sidewalks will be but ten feet in width when the street railway referred to in said amended bill of complaint is constructed upon Church Street, as proposed.

They deny that if or when the City and County of San Francisco constructs outer tracks on Church Street, as proposed, there will be only six feet, or thereabouts, of space between cars operated on said outer tracks and the curbs on said street, and on the contrary
257 allege that there will be eleven feet, or thereabouts between said outer tracks and said curbs.

They further deny that the space between said outer tracks, when constructed, and the curbs would be or will be at all insufficient to accom-odate the traffic on said street, and further deny that such traffic will be compelled to use the space occupied by the tracks of complainant.

They further deny that the addition of two tracks in said portion of Church Street would tend to produce, or would produce any such congestion of traffic as would interfere with the operation of complaint's cars or cause any delays or any increased operating expenses. On the contrary they allege that the width of Church Street is amply sufficient to allow the construction of said two outer tracks, as proposed, without causing any congestion of traffic or interference with the operation of complainant's cars or any delays or increased operating expenses.

III.

Answering paragraph XVI½ of said amended bill of complaint said defendants and respondents admit that the Board of Supervisors

of the City and County of San Francisco did on June 11, 1906, adopt Ordinance No. 20, New Series, set forth in the aforesaid paragraph XVI½ of said amended bill of complaint. In that behalf they allege that the Charter of the City and County of San Francisco, in Article II, Chapter I, Section 16 thereof, provides as follows:

"No bill for the grant of any franchise shall be put upon its final passage within ninety days after its introduction."

In that behalf said defendants and respondents allege that the aforesaid Ordinance No. 20, New Series, was put upon its final passage by said Board of Supervisors and was finally passed and
258 approved within less than ninety days after its introduction as a bill before said Board of Supervisors.

Further answering said paragraph of said amended bill of complaint said defendants allege that they are and each of them is without knowledge as to the cost of the reconstruction of complainant's lines, set forth in said paragraph XVI½ of said amended bill of complaint.

Wherefore, said defendants and respondents pray for judgment in their favor as particularly set forth in their original answer to complainant's amended bill of complaint herein.

City and County of San Francisco, a municipal corporation, James Rolph, Jr., individually and as mayor of the City and County of San Francisco and ex-officio president of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lehaney, J. Emmett Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a municipal corporation, Thomas A. Cashin, individually and as Superintendent of the municipal railways of the City and County of San Francisco, a munic-
259 ipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a municipal corporation, defendants and respondents.

PERCY V. LONG,
City Attorney of the City and County of San Francisco, Solicitor for Defendants and Respondents.

THOS. E. HAVEN,
GEORGE LULL,
Of Counsel for Defendants and Respondents.

260 UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

Thomas A. Cashin, being duly sworn, deposes and says: I am one of the defendants and respondents named in the foregoing answer. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

THOMAS A. CASHIN.

Subscribed and sworn to before me this 30th day of August, 1916.
[SEAL.] A. J. NAGLE,
Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of within original this 30th day of Aug. 1916.
WM. M. ABBOTT AND
WM. M. CANNON,
Solicitors for Complainant.

Endorsed: Filed Aug. 30, 1916. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

261 In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al., Defendants and Respondents.

Opinion of the Court.

262 The United Railroads of San Francisco, a public service corporation operating street railway lines in San Francisco under certain franchises granted to its predecessors, has constucted a double track line on Market Street from the Ferry to Seventeenth Street, a distance of more than twenty blocks. When the cars of the company reach their destination at the foot of Market Street, they turn on a loop, the loop being situated on property of the State of California; but the complainant company has the right to operate under a revocable license of the Board of Harbor Commissioners, in which body is vested the control of the State property at the Ferry. Cars belonging to the municipality have operated

on Market Street between Kearney Street and the Ferry since November, 1912, the municipal cars, and what are called the "Sutter Street cars" operated by the complainant under an agreement to use tracks outside of, and parallel to, the tracks used by the United Railroads corporation, operating under franchise heretofore referred to. The municipal cars and the Sutter Street cars make the turn at the Ferry under an agreement to use a second, or outer loop, on the State property operating under the same license from the Board of Harbor Commissioners. The municipality claims authority to construct, and threatens to construct, a line which will parallel the lines of the United Railroads from Kearney to Seventeenth Street, and from Church Street to Van Ness Avenue by way of Mar-
263 ket Street, crossing the tracks of the complainant in a number of places.

Complainant asks injunction preventing the City from constructing the proposed municipal lines upon Market Street and the other streets described, and also from cutting the tracks of the complainant which form its intersecting lines with its main line on Market Street. Issues were duly framed, hearing was had and the matter submitted for decision.

264 At the time that the franchise under consideration was granted, on September 15, 1879, approved by the Mayor of San Francisco, September 20, 1879, and accepted in writing by the predecessor of the present complainant, §499 of the Civil Code of California provided as follows:

"Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

Incorporated in the franchise are the following sections:

"Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said company, upon such terms, conditions and restrictions as are now imposed, or may hereafter be imposed, by the laws of the State of California, and especially the terms, conditions and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State and a strict compliance on the part of said Company with all of the provisions of said laws is hereby required."

"Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation and no more the right to use either of the aforesaid streets for a distance of five blocks and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies as well as corporations."

"Section 12. Said Railway Company is hereby required to file in the office of the Clerk of the Board of Supervisors of the City

and County of San Francisco, an acceptance, in writing, of the provisions of this order, under its corporate seal, signed by its President, and countersigned by its Secretary, and thereupon the provisions of this order shall be taken and deemed to be a contract, between said Company and said City and County. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void."

265 It is not necessary to set forth the specific provisions *of* further provisions of the statutes, and merely for convenience they may be cited as follows:

By an act of the Legislature of the State of California (Statutes 1869-1870, page 481, approved March 28, 1870) the Board of Trustees or Supervisors of incorporated cities and towns were authorized to grant street railway franchises subject to certain restrictions. Among such restrictions we find, in §1 of the last referred to statute, authority given to the Trustees, City Council or Supervisors of incorporated cities, and Boards of Supervisors of the various counties outside of cities or towns incorporated, to grant to any person or corporation the right to lay down and maintain for a term not exceeding twenty-five years, an iron railway upon tracks or public highways in the cities or towns or counties, outside of cities or towns incorporated, and to run cars thereon, and to carry passengers or freight; provided that whenever any other railroad or company shall be granted the use of the same street or any part thereof, they shall pay for the use of the rails already laid an equal share of the cost and maintenance of the railroad on the street, or part of the street, thus jointly occupied, and thereupon shall be entitled to the joint use of such part of said railroad; but no such grant shall be made for more than five blocks in

266 all.

By an Act of the legislature of April 4, 1870 (Statutes 1869-1370, page 786), §1, just heretofore cited, was amended. The amendment gave the right to the trustees, city council or supervisors of all incorporated cities or towns, or the supervisors of any city or county within the limit of such cities and towns, or the boards of supervisors of such cities or counties outside of such cities or towns, to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron track or tracks, upon any street or highway in said cities or towns, or in said counties outside of such cities or towns, and to run horse or other cars thereon; provided, when any other railroad or company should be granted the use of the same street, or any part thereof, they should pay for the use of the rails already laid an equal share for the cost and construction and maintaining a railroad on the street, or part of the street, thus occupied jointly, and thereupon should be entitled to the joint use of such part of said railroad; but no such joint grant should be made for more than two blocks in all.

This section, 1, of the Act just heretofore referred to was again amended on March 23, 1872 (Statutes 1871-1872, page 515). The amendment was substantially like the amendment of April 4, 1870, except that the joint grant contemplated was only authorized

267 to be made in the City and County of San Francisco for not more than two blocks in all.

The codes of California became effective January 1, 1873, and there we find the whole subject of street railroad corporations embodied in Title 4, Part 4, Division 1, of the Civil Code, §§497-511. Sections 497, 499 and 500 read as follows:

Section 497. "Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the Trustees, Council, or other body to whom is intrusted the government of the city or town under such restrictions and limitations and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses or mules, unless for special reasons, as hereinafter provided."

Section 499. "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

Section 500. "Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in Chapter II, Title III, of this Part. In laying down the track and preparing therefor, not more than one block must
268 be obstructed at any one time, nor for a longer period than ten working days."

Thereafter, in 1876, §497 was amended, but reference to the amendment is unnecessary further than to say that it was for the purpose of enabling franchises to be granted to be operated by cable lines.

Thereafter, February 25, 1891, §497 of the Civil Code was again amended (Statutes and Amendments of 1891, page 12). The essential point of this amendment was to authorize electricity to be used as motive power, and to give to municipal authorities the right to impose such terms, restrictions and limitations on the use of the streets, and the construction and mode of operating the railroads, as might be deemed necessary for public safety or welfare.

Section 499, heretofore quoted, was amended February 25, 1891, and the section made to read as follows:

"Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

269 Again, in 1907, §499 was amended (Statutes and Amendments 1907, page 837, and we find the Statute reading as follows:

"Two or more lines of street railway, operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the

companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such lease or contract, upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly; but in no case shall a company owning or operating one line of street railway be permitted to condemn the right to occupy and use the same street or tracks for a distance of more than five blocks consecutively. Where such portion of such street shall be occupied by a track or tracks of a different gage from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

270 Thereafter, in 1911, the legislature amended §499 by two provisions. They read as follows:

"The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways; but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecutive blocks without the consent of the person or company occupying said portion of the street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly; provided, that any incorporated city, city and county or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitation before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can

271 be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

By §4408 of the Political Code, effective from and after January 1, 1873, the board of supervisors of the municipality has power to regulate the streets in the city and the use thereof. On January 8,

1900, the charter of the City and County of San Francisco became effective as the organic law of the City and County of San Francisco.

In §1 of Chapter 22 of the charter as adopted, it was provided in subdivision 27 that the board of supervisors should have power to regulate street railroads, tracks and cars; to compel the owners of two or more of such roads using the same street for any distance not exceeding ten blocks, to use the same tracks and to equitably divide the cost of construction and expense of maintenance thereof beween the owners; to fix, establish and reduce the fares and charges for transporting passengers and goods thereon; to regulate rates of speed and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads. As amended in due form, in December, 1902, the amendment being approved by the legislature February 5, 1903, the board of supervisors has the power to regulate street railroads, tracks and cars to permit two or
272 more lines of street railways operated under different management to use the same street, each paying an equal portion for the construction and repair of the tracks and appurtenances used by said railways jointly for such number of blocks consecutively, not exceeding ten blocks, to regulate fares and charges for transporting passengers; to regulate rates of speed and pass ordinances to protect the public from danger and inconvenience in the operation of such road.

The constitution of the State of California, §19, Article XI, by amendment approved October 10, 1911, provides:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

273 The contention of the complainant is that the threatened action of the city would violate the rights granted to the complainant by its franchises and guaranteed by the provisions of the Federal and State Constitutions in these respects:

First: That the complainant's franchise constitutes an irrevocable contract, the obligation of which will be impaired by the proposed action of the municipal authorities;

Second: That such proposed municipal action will deprive the complainant of its property without due process of law and without compensation, contrary to the provisions of the Constitutions of the United States and the State of California;

Third: That the proposed municipal action will, in contravention of the Constitltion of California, damage the property, that is, the franchise, of the complainant, without compensation first paid:

Fourth: That the municipality has not solicited and considered offers for the sale to the City and County of the lines of the complainant, and has, therefore, not complied with the provisions of §2, Article XII, of the charter, compliance with which is a condition precedent to the acquisition of a public utility.

274 After careful study of the case and of the very able briefs of counsel for the respective parties, I shall, without attempt at elaboration state the conclusions I have reached upon those points which seem to me to be most important.

In the construction of legislative enactments and of ordinances and of contractual relationships which directly concern the public, the doctrine which controls is as announced in Knoxville Water Company vs. Knoxville, 200 U. S. 22, "A municipal corporation when exerting its functions for the general good is not to be shorn of its powers by mere implication. If by contract or otherwise it may in particular circumstances restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

This general rule is but another form of stating a principle that statutory grants by way of franchise or property, in which the Government or public has an interest are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.

It is very important to note that words of direct expression or intention to grant an exclusive franchise are not to be found in the instrument itself; nor does it appear that exclusiveness was a positive consideration for the contractual obligation. Nor is there any expression by apt words to show that the city intended to exclude itself from exercising the privilege of establishing a street railway of its own. No deliberate purpose to make a surrender of exclusive rights appearing, I accept the more reasonable interpretation of the language used, and regard the franchise as not referring such exclusive right as against the city, unless it must be held that the

275 law itself operates to make the franchise exclusive pro tanto.

Title IV of the Civil Code, in which is found Section 499, relates to street railroad corporations. Title IV follows Title III which has to do with railroad corporations in contradistinction to street railroad companies. Section 497 of Title IV contains general authority to municipal bodies to give authority to lay street railway tracks through streets of cities and towns. Section 498 restricts the city authorities with respect to granting certain manner of construction.

In San Jose, Los Gatos, etc., Railway Company vs. San Jose Railway Company, 156 Federal 458, the U. S. Circuit Court of Appeals for this Circuit speaking through Judge De Haven, said the main purpose of Section 499 is, "to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two rail-

ways under different managements were permitted to use the same street for a distance of more than five consecutive blocks."

In Omnibus Railroad Company vs. Baldwin, 57 Cal. 168, the Supreme Court of California held that the first clause of Section 499 means "that a right to use the same street cannot be granted
276 to more than two corporations in any case, and if granted to two, it must be upon the condition that both use the same track, and that each pay an equal portion of the cost of constructing it." The second clause was held not to contain anything which conflicted with the first, but as simply adding another limitation that "in no case must two railroads occupy and use the same street or track for a distance of more than five blocks." The learned Court distinguished between the right of use of the same track and the permission to use the same street under conditions prescribed, and after making references to such distinction, added that the limitation is not at all qualified in respect to permission to use the same street on the conditions prescribed by the subsequent clause, which the Court said, "simply adds a further limitation which in no sense can be regarded as inconsistent with that contained in the preceding clause."

The argument of the learned counsel for the complainant addressed to the proposition that the provision against the use of the same street for more than five blocks by more than two railroad companies is a provision of substantive law which became a part of the franchise and conferred upon the complainant pro tanto exclusive rights, has received very careful attention. So also has the contention that the change in the phraseology made in section 499 in the course of its history, must be considered to have been made for a definite purpose, and that that purpose was the putting a prohibition upon the very use and occupation of the city streets by two railroad corporations and not merely upon the power of the city to authorize com-
277 plainant to use and occupy such streets.

And yet, I believe that the section should be read as a whole and is not to be separated into two wholly independent provisions, whereby the one is to be read as appertaining only to permission and the other as solely writing a prohibition to be regarded as a general law of the State binding upon municipal or other corporations, and not open to repeal or modification as affecting the franchise of complainant. The interpretation I put upon the last clause of Section 499, is that in no case must two railroad corporations, granted permission under the section, occupy and use the same street or track for a distance of more than five blocks. Permission is indispensible. There may be permission for joint use, but such use shall not be authorized for more than five blocks. That this was the construction put upon the provision by those directly interested at the time of the grant of the franchise is a fair inference when we consider the language of Section 5 of the franchise, which provides in effect, that the supervisors may grant to one other corporation and no more, the right to use either of the streets described in the franchise, for a distance of five blocks and no more, "upon the terms and conditions specified in the 499th section of the Civil Code of this State."

In Wheeling and Belmont Bridge Company vs. Wheeling Bridge Company, 138 U. S. 287, the court declined to regard an act of the legislature which was in force after the grantee had obtained his franchise but which was repealed during the life of the franchise, as accompanied by any conditions that made the legislative act take the character of a contract, the court saying that it was a matter of ordinary legislation subject to be repealed at any time that the judgment of the legislature should require the appeal. The court
278 said, "An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions." Williams vs. Wingo, 177 U. S. 601. If I am right in my construction of Section 499, the prohibition became subject to repeal at the legislative will.

The argument of learned counsel for complainant would lead to a limitation upon the exercise of the police power which would restrict it within narrower limitations *that* I think is justified. It will not be disputed that definite limitations are not to be regarded as a surrender of the police power. It is accepted that the destruction of the franchise is not possible, but even so, in the complexities of modern society new conditions present themselves which may call for the safeguarding of the public interests in a way which justifies the application of the doctrine that the police power may extend to all great public needs. German Alliance Insurance Company vs. Lewis, 233 U. S. 389; Noble State Bank vs. Haskell, 219 U. S. 110; Canfield vs. United States, 167 U. S. 524; Rail River Coal Company vs. Yaple, 214 Fed. 273.

These principles are not antagonistic to the further familiar principle that the police power of a State cannot be arbitrarily exercised. But the trend of authority is shown in Hadacheck vs. Sebastian, Chief of Police of the City of Los Angeles, 239 U. S. 394, where the Supreme Court held that it is to be remembered that the
279 police power is one "of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold, would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community." Bacon vs. Walker, 204 U. S. 311; German Alliance Insurance Company vs. Kansas, 233 U. S. 389; Rail & River Coal Company vs. Yaple, 214 Fed. 273.

If, as in Grand Trunk Western R. Company vs. South Bend, 227 U. S. 544, there was a threat here to destroy a franchise right, a very different case would be presented. The existence of the franchise enjoyed by the complainant, is however, not threatened, nor is an attempt being made to change or modify the provisions of the franchise.

As to the need for the action contemplated by the city, but a word

is necessary. The showing negatives any idea of arbitrary exercise of power. Questions of traffic and of the increase of danger consequent upon increasing the number of tracks and street cars in a street being ordinarily matters for legislative rather than judicial control, the necessity for action by city authorities concerning transport-ion facilities is to be solved by the exercise of the judgment of the municipal authorities proceeding within the limits of their general authority.

280 There being no statutory rule against one street railway company from crossing the tracks of another, I do not find that compensation must first be paid for the crossing. The consolidated Traction Company vs. The South Orange and Maplewood Traction Company, 56 New Jersey Equity 569, contains a very able discussion of the law upon this point, the Court holding that although a crossing necessitates some actual interference with tracks as constructed, and to some extent changes thereafter the exclusive use by the one company at the crossing, still such changes are the necessary result of the development of the method of operating electric roads at their points of crossing, and are such as are made necessary as the best and safest methods now attainable for the safety and convenience of the public in the operation of both roads at the point of crossing; that they are changes and burdens in the use of its tracks and trolley system, to which the original right to lay and construct them was necessarily subject. Sections 469 and 500 of the Civil Code do not affect the applicability of this general rule; moreover, it would seem that in Market Street Railway Company vs. The Central Railway Company, 51 Cal. 583, a street railroad company within the State of California is properly using the streets upon which it has a right of way, and for crossing the tracks of another need not compensate that company for damages caused by the crossing, provided always the crossing is to be made in a suitable manner.

Upon the point that the property of complainant will be taken or damaged contrary to the Constitution of the United States and
281 of the Constitution of the State of California by interference with the exercise of the complainant's franchise, in that there will be a blanketing of the complainant's cars by the cars of the city, it is to be observed that some inconvenience will follow the construction and operation of the additional lines by the city. But complainant never has had a right by virtue of the franchise to such free and uninterrupted use of the streets as will relieve it of such inconvenience as may follow from the operation by the city of a municipal railroad, provided the right to operate such railroad was reserved to the city. Pacific Railway Co. vs. Wade, 91 Cal. 449.

Such inconveniences are susceptible to minimization by regulation, but do not authorize conclusion that there is violation of constitutional right. Competition may result injuriously but it is not a taking. Madera Water Works vs. Madera, 228 U. S. 454; N. Y. and H. R. R. Company, vs. Forty Second St. R. R. Company, 50 Barbour, N. Y. 285.

In Hamilton Gas Light Company vs. Hamilton, 146 U. S. 258, it was held that consideration of the possible impairment of the value

of plaintiff's street railway company cannot control the decision of the legal rights of the parties. Contingencies of such character, if it is desired that they should be guarded against, must be an-
282 ticipated by such clear and explicit language as will take the contract out of the established rule that public grants susceptible of two constructions must receive the one most favorable to the public.

The point that the municipality has not solicited and considered offers for the sale to the City and County of the lines of the United Railroads, and therefore has not complied with Section 2, Article XII of the Charter, compliance with which is a condition precedent to the acquisition of a public utility, cannot be sustained in the light of the proceedings pertaining to solicitation for offers and the proceedings of the Board of Supervisors. No point has yet been reached where injunction can be asked by complainant. My opinion being that complainant has failed to make a proper case for injunction, decree will go against it and favor of respondent.

WM. H. HUNT, *Judge.*

Endorsed: Filed Jan. 18th 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

283 At a Stated Term, to wit: the November Term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, Held at the Court-room, in the City and County of San Francisco, on Thursday, the 18th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable William H. Hunt, Circuit Judge, designated to hold and holding this Court.

Equity. 280.

UNITED RAILROADS OF SAN FRANCISCO, etc.,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.

(Order Denying Application for Injunction, etc.)

This suit heretofore tried and submitted, being now fully considered, and the Court having filed its opinion, it is ordered that the application for an injunction be and the same is hereby denied, that the temporary restraining order heretofore issued be and the same is hereby dissolved, and that a decree in favor of respondents be signed, filed and entered in accordance with said opinion.

284 Copy.

In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

versus

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Final Decree.

This cause came on to be heard, at this term, and was argued by Counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

285 I.

That complainant take nothing herein and that all relief prayed for by said complainant be and the same is hereby denied to said complainant;

II.

That the application of complainant for an injunction herein be and the same is hereby denied;

III.

That the preliminary restraining order and writ of temporary injunction heretofore issued in the above entitled cause be and the same is hereby dissolved, vacated and set aside;

IV.

That the defendants and respondents herein do have and recover from the complainant their costs of suit herein to be taxed.

Dated; January 24th, 1917.

WILLIAM H. HUNT, *Judge.*

Endorsed: Filed and entered January 24, 1917. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

286 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 280.

In Equity.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Statement of Evidence.

The above entitled cause came on for final hearing before the above entitled Court, Honorable Wm. H. Hunt presiding, on August 22nd,

1916. Wm. M. Abbot, Esq. and Wm. M. Cannon, Esq., appeared on behalf of the complainant, and Thomas E. Haven, Esq.
287 and George Lull, Esq., appeared on behalf of the defendants.

Counsel for the complainant having made a brief statement of the character of the suit, it was thereupon stipulated and agreed by counsel for the respective parties that the City of San Francisco has a population of 525,000 people or more, 315,000 of whom occupy an area of approximately 21.382 miles in the northeasterly part of said City and County, and the remaining 210,000 are scattered throughout the rest of said territory. It was further admitted by counsel for the defendants that the allegations to paragraph VI of the Amended Bill of Complaint with reference to the amount of taxes and license fees paid by or assessed against the complainant for the purposes and *and* at the times set forth in said paragraph VI of said Amended Complaint were true.

Counsel for the complainant thereupon offered and there was received in evidence Ordinance No. 1857, N. S. of the City and County of San Francisco, State of California, approved March 26, 1912, regulating moving travel and traffic upon the streets and other public places of the City and County of San Francisco and providing a punishment for the violation thereof. Said ordinance reads as follows:

"Be it ordained by the people of the City and County of San Francisco as follows:

Terms, Streets Curbs, Vehicles, Moving Travel and Traffic Defined.

Section 1. The following terms, whenever used herein, except as otherwise specifically indicated, shall be defined to have and shall be held to include, each of the meanings herein below respectively set forth, and any such terms used in the singular number shall be held to include the plural.

Street.—Every avenue, boulevard, highway, roadway, lane, alley, strip, path, square and place used by or laid out for, the use of vehicles, within the City and County of San Francisco.

Curb.—The lateral boundaries of that portion of the street designed or intended for the use of vehicles, whether marked by curbing constructed of stone, cement, concrete, or other material, or not so marked.

288 Vehicle.—Every wagon, hack, coach, carriage, omnibus, push-cart, bicycle, tricycle, motor-bicycle, automobile, or other conveyance, except baby carriages and children's play wagons, in whatever manner, or by whatever force or power the same may be driven, ridden, or propelled, which is or may be used for, or adapted to pleasure riding, or transportation of passengers, baggage, merchandise, or freight, upon any street; and every draft or riding animal, whether ridden, driven or led, excepting that an animal or animals, attached to any vehicle, shall with such vehicle, constitute such vehicle; provided, however, that nothing herein contained shall be

construed to affect in any way the operation of railroads or street railways, upon any street, which said railroads or street railways are expressly exempted from the provisions of this ordinance, except as herein specifically provided.

Moving Travel and Traffic.—For the purposes of this Ordinance the term 'Moving Travel and Traffic' is intended to include vehicles in actual motion and also those which may be at rest upon the streets and those which are at rest and intended or expected to soon again be put in motion.

Business District.—For the purposes of this Ordinance the term 'Business District' shall mean the territory contiguous to any public street in this City and County mainly built up with structures devoted to business.

Closely Built Up District.—The term 'Closely Built Up District' shall mean the territory contiguous to a public street in this City and County which is on the line of any public street not mainly devoted to business where for not less than a quarter of a mile the dwelling houses and business structures average less than one hundred feet apart. As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Careful Riding and Driving.

Section 2. Every person riding, driving, propelling or in charge of any vehicle upon any of the streets, shall ride, drive or propel such vehicle upon such streets in a careful manner and with due regard to the safety and convenience of pedestrians and all other vehicles upon such streets.

Vehicles Turn to the Right.

Section 3. Every person riding, driving, propelling or in charge of any vehicle, upon meeting any other vehicle at any place upon any street, shall turn to the right, and, on all occasions, when it is practicable so to do, shall travel on the right side of such street, and near the right hand curb thereof, excepting when the right hand side of the street is obstructed by teams, building or other material, or when the street is closed for repairs; in such cases the travel shall be as far away from the left hand curb as possible so as to allow other vehicles to freely pass.

289 Turn to Right on Streets Having But Two Wheel Tracks.

Section 4. Every person riding, driving, propelling or in charge of any vehicle upon any street having but two wheel tracks, or well-beaten paths for vehicles, is hereby required, when practicable, to turn to the right and to surrender the left track upon meeting any vehicle going in the opposite direction.

Vehicles Pass to the Left on Overtaking Another Vehicle.

Section 5. Every person riding, driving, propelling, or in charge of any vehicle upon any street, shall, in overtaking any other vehicle,

pass to the left of such vehicle, and the person in charge of such vehicle being so overtaken and passed shall give way to the extreme right to allow such vehicle to pass with safety.

Keeping Vehicles Close to the Curb.

Section 6. Every person riding, driving, propelling, or in charge of any vehicle moving slowly upon any street, shall keep such vehicle as close as possible to the curb on the right, allowing more swiftly moving vehicles free passage on the left.

Turning, Stopping or Changing Course of Vehicles.

Section 7. Every person riding, driving, propelling, or in charge of any vehicle upon any street, shall, before turning, stopping, or changing the course of such vehicle, first see that there is sufficient space so that such movement can be made in safety and shall then give a plainly visible or audible signal to the police officer in charge of the crossing or to the persons in charge of vehicles behind the vehicle so turning, stopping, changing its course, or turning from a standstill; of his intention to make such movement, except when followed by rapidly propelled vehicles, in which event no turn shall be made until such vehicle shall have passed on the left. Such signal shall be given by raising the hand or whip and indicating with it the direction in which the turn is to be made.

Turning Corners.

Section 8. Every person riding, driving, propelling, or in charge of any vehicle in or upon any street, shall in turning to the right into another street, turn the corner as near the right hand curb as possible.

Every person riding, driving, propelling or in charge of any vehicle turning to the right from one street into another, shall have the right of way over vehicles traveling in the direction in which such vehicle is turning; and every person riding, driving, propelling or in charge of any vehicle traveling in the direction in which such vehicle is turning shall allow such right of way to such vehicle so turning.

Turning from One Street into Another Around Center Intersection.

Section 9. Every person riding, driving, propelling or in charge of any vehicle, in or upon any street, shall, in turning to
290 the left into another street, pass to the right of and beyond the center of the street intersection before turning.

Every person riding, driving, propelling or in charge of any vehicle turning to the left from one street into another street shall allow the right of way to vehicles traveling in the direction in which such vehicle is turning; and every person riding, driving, propelling or in charge of any vehicle traveling in the direction in which such

vehicle is turning shall have the right of way over such vehicle so turning. As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Turning and Heading in Direction of Traffic.

Section 10. Every person riding, driving, propelling or in charge of any vehicle crossing from one side of any heavily traveled streets as hereinafter defined to the other side thereof, shall make such crossing by turning to the left so as to head in the direction in which the traffic is moving on the side of the street toward which such crossing is made.

Stopping with Left Side of Vehicle to Curb.

Section 11. It shall be unlawful for any person riding, driving, propelling or in charge of any vehicle to stop the same or cause the same to be stopped with the left side of such vehicle toward or along, or next to the curb except in the residential districts. As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Stopping Vehicles Close to Curb, Except in Cases of Emergency.

Section 12. No person riding, driving, propelling or in charge of any vehicle, shall stop such vehicle upon any street except as close to the curb as practicable; provided, however, that this section shall not apply in case of emergency or when such stop is made for the purpose of allowing another vehicle or pedestrian to cross its path.

Backed to Curb Only When Loading and Unloading.

Section 13. No person riding, driving, propelling or in charge of any vehicle upon any street, shall allow such vehicles to remain backed up to the curb except when such vehicle is being actually loaded or unloaded, except as hereinafter provided.

It shall be unlawful for any person in charge of any vehicle standing alone or near the curb in any street within the business district, to fail, refuse, or neglect to move such vehicle away from such curb when requested so to do by any police officer.

Keeping Animals Turned in the Direction of Traffic.

Section 14. Every person in charge of any draft animal attached to a vehicle backed up to the curb upon any street, shall turn and keep such animal turned at right angles to such vehicle and in the direction which the traffic upon the side of the street is moving.

291 Right of Way of Vehicles on Streets Running Easterly and Westerly.

Section 15. The operators of vehicles approaching any intersection of the streets in this City and County shall yield the right of

way to vehicles approaching such intersection from the right of such first named vehicles.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Right of Way for Fire Department Apparatus, Ambulances, Police Department.

Section 16. The officers and firemen of the Fire Department, Fire Marshal, Underwriters' Fire Patrol, Commercial Fire Dispatch, and their apparatus of all kinds, when going to, or on duty at, or returning from a fire, and all ambulances, whether of a public or private character, and all other vehicles when employed in carrying sick or injured persons to hospitals or other places for relief or treatment, and the officers and policemen and vehicles of the Police Department and auxiliary fire apparatus belonging to any person, firm or corporation engaged in the business of furnishing gas or electricity to the City and County of San Francisco or its inhabitants, when such apparatus is responding to a call to a fire, and *to* any vehicle belonging to any person, firm or corporation engaged in the business of transporting persons to the premises of the persons transported, when such vehicle is responding to a call to a fire or to a burglar alarm shall have the right of way over all vehicles or persons on any street and through any procession, except over vehicles carrying the United States mail; and when the Fire Department, Underwriters' Fire Patrol or Police Department is responding to an alarin all vehicles shall come to a standstill along the right curb in direction being traveled by such vehicles until the vehicles of the Fire Department and Underwriters' Fire Patrol, shall have passed, and no vehicle shall stop on any cross street excepting close to the curb and far enough away from the intersecting street to allow the above mentioned vehicles to safely turn.

It shall be unlawful for any person riding, driving, propelling or in charge of any vehicle or street car in or upon any street or for any person standing or walking in any such street, to fail, refuse or neglect to allow the right of way to any officer or fireman or apparatus of the Fire Department when the same is going to or on duty at or returning from a fire, or to any ambulance, whether of public or private character, or to any other vehicle when such vehicle is employed in carrying a sick or injured person to a hospital or other place for relief or treatment, or to any officer or policeman or vehicle of the Police Department or to any auxiliary fire apparatus belonging to any person, firm or corporation engaged in the business of furnishing gas or electricity to the City and County of San Francisco or its inhabitants, when such apparatus is responding to a call to a fire, and to any vehicle belonging to any person, firm or corporation engaged in the business of transporting persons to the premises of the persons transported, when such vehicle is responding to a call to a fire or to a burglar alarm.

292 Drivers Must Stop Near Curb on Approach of Fire Apparatus, etc.

Section 17. Upon the approach of any apparatus of the Fire Department, Fire Marshal, Underwriters' Fire Patrol, Commercial Fire Dispatch or any police patrol wagon or any ambulance or any auxiliary fire apparatus belonging to any person, firm or corporation engaged in the business of furnishing gas or electricity to the City and County of San Francisco or its inhabitants, when such apparatus is responding to a call to a fire, and to any vehicle belonging to any person, firm or corporation engaged in the business of transporting persons to the premises of the persons transported, when such vehicle is responding to a call to a fire or to a burglar alarm, every person riding, driving, propelling or in charge of any vehicle in or upon any street shall immediately stop such vehicle as near as possible to the right hand curb of such street, and it shall be unlawful for any such person to cause or permit such vehicle to be moved until such apparatus, police patrol wagon or ambulance shall have passed such vehicle.

Keeping Vehicles Away from Street Cars.

Section 18. Every person riding, driving, propelling or in charge of any vehicle upon any street, shall keep such vehicle at least six feet on the right hand side from the running board or lowest step of any street car which is stopping for the purpose of taking on or discharging passengers; and if, by reason of the presence of vehicles at the place where such car is stopping, or by reason of the narrowness of the street, or for any other reason, it is not possible to preserve such distance of six feet from such running board or lowest step, as herein prescribed, then such person shall stop such vehicle until such car shall have taken on, or discharged its passengers and again started.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Hitching Team or Standing Autos, etc., on Streets 20 Feet from Crossing.

Section 19. It shall be unlawful for any person to hitch, or to cause or permit to be hitched, any horse, mule or other animal, or to leave standing or to cause or permit to be left standing, any bicycle, motorcycle, automobile, buggy, carriage, wagon or other vehicle, upon any street along which street cars or interurban railway cars are run or operated, within twenty feet of either side line of any street that crosses, intersects or terminates in such street, or within twenty feet of either such side line extended across such streets at right angles. Provided, however, that none of the conveyances or other vehicles mentioned herein shall be left standing or permitted or caused to be left standing within fifty feet of either side line of any street that intersects the southerly line of Market street, between

Third street and Embarcadero, and the northerly line of Market street between Kearny street and Embarcadero.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

293 Stopping Vehicles Near Fire Hydrants.

Section 20. It shall be unlawful for any person to hitch, or to leave standing, or to cause or permit to be hitched or left standing, any animal, or to leave standing or to cause or permit to be left standing any vehicle, or to stop or to cause to be stopped, any animal or vehicle, in or upon any public street within twenty (20) feet of any fire hydrant unless such animal is in charge of some person capable of driving the same, or unless such vehicle is in charge of some person capable of driving or operating the same.

Stopping Vehicles on Market, Kearny, O'Farrell, Geary, Post, Grant Avenue, Stockton and Powell Streets for More Than Forty Minutes.

Section 21. Between the hours of 10 o'clock a. m. and 12 o'clock m. and 1:30 to 6 o'clock p. m. of any day except Sunday and legal holidays it shall be unlawful for the driver, operator or owner of any motor or horse drawn vehicle to permit such vehicle to stand for more than forty minutes on any of the following streets or portions of the following named streets, to-wit:

Market street from Montgomery to Sixth and Taylor streets.
Kearny street from Market to Sutter street.
O'Farrell street from Grant avenue to Powell street.
Geary street from Kearny to Mason street.
Post street from Montgomery to Powell street.
Sutter street from Kearny to Stockton street.
Grant avenue from Market to Sutter street.
Stockton street from Market to Sutter street.
Powell street from Market to Post street.
Ellis street from Stockton to Powell street.
Eddy street from Powell to Mason street.
Savings Union place from northerly termination thereof to O'Farrell street.

Vehicles for hire to be limited to the north side of Geary street, between Stockton street and Powell street, and the west side of Stockton street, between Geary street and Post street.

Provided, that vehicles for hire shall not use the south side of Post street, between Stockton street and Powell street, and the east side of Powell street between Geary street and Post street, but the same shall be for the use of the public on all days except Sundays and holidays.

Provided, that stoppages caused by fires, blockades, breakdowns or other emergencies, or an ambulance, shall not be considered within the provisions of this Ordinance.

Provided, that the provisions of this section shall not apply to the standing of any freight or baggage vehicle, or for any passenger vehicle, for which a permit has been granted, under the provisions of

Ordinance No. 1898 (New Series), for such vehicle to stand upon any of the streets, or portions of such streets, as herein defined, during the time such vehicle is in charge of a person competent to drive the same; and

294 Provided, that the Board of Public Works shall erect and maintain suitable signs at proper points warning the owners and drivers of all vehicles of the provisions of this section.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Section 21*a*. It shall be unlawful for the driver, operator or owner of any motor or horse drawn vehicle to permit such vehicle to stand on the south side of Manila street from Kearny street to Grant avenue or on the north side of Manila street from Grant avenue to Stockton street.—New Section added by Ordinance No. 3495 (New Series), approved November 5, 1915.

Selling Animals on Streets.

Section 22. No person shall expose for sale, or cause to be exposed for sale or sold, upon any of the streets of this City and County, any horse, mule, cow, bull, steer or any animal of any description whatsoever; and all sales of stock as aforesaid must be conducted in yards, enclosures or buildings, securely constructed so as to prevent such animals as aforesaid from breaking loose and entering any of the streets of this City and County; and all animals intended for sale in such yards, enclosures or buildings shall be conveyed thereto before the hour of 8 o'clock a. m., and not removed therefrom before the hour of 5 o'clock p. m., except in the cases of broken horses or mules, which shall be led by halter or bridle.

Washing Animals or Vehicles on Streets.

Section 23. It shall be unlawful for any person to wash or cause to be washed, any animal or vehicle, between the hours of 8 o'clock a. m. and 10 o'clock p. m., on any public highway within that portion of the City and County lying east of Divisadero and Castro streets and north of Twenty-sixth street.

Driving on Outside Rail of Car Tracks.

Section 24. It shall be unlawful for any person to so drive any wagon, cart or other vehicle on any street, or any portion of any street, paved with bituminous rock, on which the rails of a street railroad are laid, that the wheel or wheels on one side of such wagon, cart or vehicle shall be run or operated on and along the outer rail of said street railroad, and the wheel or wheels on the other side thereof shall be run or operated on and along the bituminous pavement between the said outer rail and the sidewalk curb.

Repairing Vehicles on Streets.

Section 25. It shall be unlawful for any person, firm or corporation to construct or cause to be constructed or repair or cause to be repaired, any vehicle or any part of any vehicle, upon any public street, except temporary repairs in case of accidents.

Allowing Unharnessed Vehicles to Stand on Streets Within Certain Hours.

Section 26. It shall be unlawful for any person owning or having control of any vehicle, except hand carts, to permit the same, while unharnessed, to stand or remain upon any sidewalk, public ground or public street after the hour of 10 o'clock a. m., except between the hours of 5 o'clock p. m. and 8 o'clock p. m.

295 No Person Except Owner, Person in Charge, or Police Officer to Unhitch Animals.

Section 27. No person within the City and County of San Francisco shall unhitch, unfasten, or release from any hitching post, or from any other mode of fastening, any horse, mare, gelding or mule, whether the same be under saddle, attached to a vehicle or without either saddle or harness, unless by and with the consent of the owner thereof, or of the person under whose immediate charge and control such horse, mare, gelding or mule may legally be at the time of said unhitching, unfastening or releasing. Nor shall any person within said City and County take possession of, ride, drive, lead away, or use in any manner whatsoever any horse, mare, gelding or mule found hitched to any hitching post or otherwise secured, upon any of the public streets, or upon any private property, or found unhitched, unfastened and loose upon the public streets of said City and County, unless with the consent of the owner thereof, or the person under whose immediate legal care and control the said horse, mare, gelding or mule may at the time be.

Provided, that any police officer may, in the discharge of his duty, remove to the Public Pound, or any other place of safety, any horse, mare, gelding or mule improperly fastened or found trespassing or astray upon any of the streets of this City. Also, provided, that any person may take charge of any horse, mare, gelding or mule, either under saddle or in harness, or attached to a vehicle, or without either saddle or harness, found trespassing and loose upon any public street; but in such case, said person shall either lead, drive or ride such horse, mare, gelding or mule, at a pace not faster than a walk, and shall deliver the same to the first police officer he may see; and, failing to meet such officer, then at the nearest police station to the place at which he may have found and taken possession of said horse, mare, gelding or mule, or at the Public Pound, if such horse, mare, gelding or mule shall have been found and taken possession of nearer to said Public Pound than to a police station.

Driving Cattle Through Streets.

Section 28. It shall be unlawful for any person to drive, or cause to be driven, any cattle, through any public street within the district bounded on the west by the westerly line of Fillmore street; on the south and southeast by the northerly line of Ridley, Fourteenth and Channel (Division) streets; on the east by the waters of the bay, from the easterly termination of Channel (Division) street, to the northerly termination of Fillmore street, between the hours of 6 o'clock a. m. and 12 o'clock midnight from the first day of April to the first day of October, and between the hours of 7 o'clock a. m. and midnight from the first day of October to the first day of April; provided, that it shall be lawful at any hour to drive cattle from the landing at the foot of Second street, along King street to
296 Third street; thence along Third street to Berry street; thence along Berry street to Sixth street; thence along Sixth street to Townsend street; thence along Townsend street to Seventh street; thence along Seventh street to Brannan street; thence along Brannan street to Ninth street; and further provided, that it shall be lawful, between the hours of 7 o'clock p. m. and 7 o'clock a. m. to drive milch cows, not exceeding ten (10) in number, from the boat landing along the Embarcadero to Commercial street; thence along Commercial street to Drumm street; thence along Drumm street to Main street; thence along Main street to Folsom street; thence along Folsom street to Second street, and thence along Second street to King street.

Driving Swine or Sheep Through Streets.

Section 29. It shall be unlawful for any person to drive or cause to be driven, any swine or sheep except within the district herein designated, to-wit:

First. From the City front to Black Point, along the sea wall to Bay street, and thence along Bay street to Black Point.

Second. From the City front to Butchertown. Along the Embarcadero to Folsom street; thence along Folsom street to Spear street; thence along Spear street to Bryant street; thence along Bryant street to First street; thence along First street to Brannan street; thence along Brannan street to Second street; thence along Second street to Berry street; thence along Berry street to Fourth street, and thence along Fourth street and across the Fourth-street bridge.

Third. From the foot of Second street to Butchertown. Along Second street to Berry street; thence along Berry street to Fourth street; thence along Fourth street and across the Fourth-street bridge.

Fourth. From the foot of Second street to Black Point. Along Second street to Bryant street; thence along Bryant street to First street; thence along First street to Folsom street; thence along Fourth street to the Embarcadero; thence along the Embarcadero and sea wall to Bay street, and thence along Bay street to Black Point.

Driving Freight Wagons on Heavily Traveled Streets with More Than Four Horses and Restricting Width and Length of Same.

Section 30. Between the hours of 8 o'clock a. m. and 7 o'clock p. m. of any day, it shall be unlawful for any person to drive or propel, or to cause or permit to be driven or propelled upon any heavily traveled street, as hereinafter defined, freight vehicles hitched tandem, or any freight vehicle drawn by more than eight (8) animals, or any wagon loaded with hay or straw, or any freight vehicle, the bed, body or carrying part of which shall exceed twenty (20) feet in length or eight and one-half (8½) feet in width, or any freight vehicle carrying a load, which load, together with the bed, body or carrying part of such vehicle, shall at any point occupy a space greater than twenty (20) feet in length or eight and one-half (8½) feet in width, or any vehicle filled with earth, sand,
297 gravel, wreckage, or such material as shall result from the repairing or demolition of any building, unless such vehicle be engaged in carrying earth, sand or gravel from some excavation made within the congested district, or wreckage or material from any building being repaired or demolished within the boundaries of the heavily traveled streets, as hereinafter defined, and then such vehicle shall proceed out of such congested district by the most direct route; provided, that the provisions of this section shall not apply to any vehicle engaged in carrying materials for use in the construction or repair of any building within the limits of such congested district.

Leading Animals Through the Streets.

Section 30½. No person within the City and County of San Francisco shall lead through the streets more than one (1) horse or team of horses or one (1) mule or team of mules, hitched to a vehicle drawn by a horse or team of horses, or mule or team of mules, behind another vehicle which is drawn by a horse or team of horses or mule or team of mules.—Added by Ordinance No. 2264 (New Series), approved April 30, 1913.

Carrying Baskets on Poles.

Section 31. It should be unlawful for any person to carry over or along any sidewalk of any public street any bag or bags, basket or baskets, suspended from or attached to any pole or poles supported upon his shoulder or shoulders.

Carrying Loads Over 15,000 Pounds.

Section 32. It shall be unlawful for any person, firm or corporation, owning or having control or charge of any truck, dray or other vehicle, to carry or cause or permit to be carried thereon along or over any public street, any load exceeding fifteen thousand (15,000) pounds in weight; provided, the hauling or moving of a single article

weighing more than fifteen thousand (15,000) pounds shall not be prohibited.

Width of Tires.

Section 33. It shall be unlawful for any person, firm or corporation, owning or having control or charge of any truck, dray or other vehicle, to carry or cause or permit to be carried thereon along or over any public street, any load exceeding four thousand (4000) pounds in weight, but not exceeding seven thousand (7000) pounds, unless the tires of the wheels of such truck, dray or other vehicle are at least three (3) inches in width; nor any load exceeding seven thousand (7000) pounds in weight, but not exceeding ten thousand (10,000) pounds, unless the tires of the wheels are at least four (4) inches in width.

Garbage Wagons on Market Street.

Section 34. Between the hours of 10 o'clock a. m. and 5 o'clock p. m. it shall be unlawful for any person to drive or propel or cause or permit to be driven or propelled any vehicle used for the transportation of garbage, ashes or refuse, along or upon Market street between Second street and Ninth street, except for the purpose of collecting or receiving garbage, ashes or refuse. Said vehicles,
298 however, shall not be prevented from going directly from one place on Market street, between Second and Ninth streets, at said times, to another place on Market street, between Second and Ninth streets, nor more than two blocks distant.

Backing of Vehicles.

Section 35. It shall be unlawful for any person to ride, drive or propel, or to cause to be ridden, driven or propelled, in, upon or along any street any vehicle in a backward direction, if, by so doing, the free and uninterrupted passage of another vehicle or of any street car or interurban car is impeded.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Tires on Traction Engines.

Section 36. It shall be unlawful for any person, firm or corporation to ride, drive or propel, or to cause or permit to be ridden, driven or propelled, along or upon any paved street any vehicle or traction engine, any tire of which is worn or is not smooth or that has a sharp or uneven surface, or any vehicle or traction engine to any tire or wheel of which is attached cleats or spikes or uneven surfaces or any device or devices that will cause damage to the pavement in such street.

Rate of Speed on Heavily Traveled Streets which are Defined.

Section 37. Every person operating or driving a motor or other vehicle on the public streets of this City and County shall operate or

drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property; provided, that it shall be unlawful to drive at a rate of speed in excess of thirty miles an hour; and provided further, that in any event no person shall operate or drive a motor or other vehicle on any public highway where the territory contiguous thereto is built up, at a greater rate of speed than twenty miles an hour; or in the business district at a greater rate than fifteen miles an hour, or at a greater rate of speed than ten miles an hour where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or a curve in a street or highway.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Rate of Speed in Tunnels.

Section 38. It shall be unlawful for any person to ride, drive or propel, or to cause or permit to be ridden, driven or propelled,
299 any vehicle in or through any tunnel at a greater rate of speed than ten (10) miles per hour.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Excepting Fire or Police Apparatus, etc., from Speed Provisions.

Section 39. The provisions of Sections 37 and 38 of this Ordinance shall not apply to the driver or occupant of any vehicle belonging to the Police Department or to the Fire Department, Fire Marshal, and Underwriters' Fire Patrol when on duty, or to the driver or occupant of any auxiliary fire apparatus belonging to any person, firm or corporation engaged in the business of furnishing gas or electricity to the City and County of San Francisco or to its inhabitants, when such apparatus is responding to a call to a fire, and shall not apply to the driver or occupant of any vehicle belonging to any person, firm or corporation engaged in the business of transporting persons to the premises of the persons transported, when such vehicle is responding to a call to a fire or to a burglar alarm; provided, however, that when any such apparatus is responding to such call there shall be displayed on both front and rear of such apparatus, in such manner as to be plainly visible, the words, 'Auxiliary Fire Apparatus,' with the name of the company by which the same is owned or operated. The letters composing such words shall be black on white background, each not less than three (3) inches in height, and each stroke shall be not less than one-half (½) inch in width.

Throwing Nails, Tacks, etc., Likely to Injure Tires.

Section 40. It shall be unlawful for any person to throw, deposit or place in or upon any public street any nails, tacks, crockery, scrap iron, tin, wire, bottles, glass, thorns or thorny clippings, or thorny branches of trees or bushes, or any other article or thing likely to puncture or injure the tire of any vehicle.

Gongs, Bells or Horn on Autos, Bicycles, etc.

Section 41. It shall be unlawful for any person to drive or propel any bicycle, tricycle, velocipede, motor-bicycle, automobile or any other riding machine or horseless vehicle, upon the streets without having attached to such bicycle, tricycle, velocipede, motor-bicycle or automobile a gong, bell or horn in good working order and of proper size and character sufficient to give warning of the approach of such vehicle to pedestrians, and to riders and drivers of other vehicles and to persons entering or leaving the street cars. Said gong, bell or horn shall be of such size only as may be necessary to give such warning and shall not be sounded except when necessary to give such warning.

300 Loud Noises and 'Sirens.'

Section 42. It shall be unlawful for any person operating vehicles described within Section 41 of this Ordinance to use thereon, while traveling through the streets, any instrument for the purpose of giving a warning which shall produce a sound of an unusually loud, annoying or distressing character, or such that will tend to frighten pedestrians or animals, it being the intention of this section to prohibit the use of so-called 'sirens' or similar instruments for the purpose of producing unusually loud or distressing or annoying sounds.

Standing of Autos, etc., on Streets of More Than 5 Per Cent Grade under Certain Conditions.

Section 43. It shall be unlawful for any person operating vehicles described in Section 41 of this Ordinance to leave such vehicles standing on grades exceeding five (5) per cent with only the brakes set, except when the front or rear wheels of such vehicles shall have been thrown in towards the curb in such a manner as to prevent such vehicle from running down the grade if the brakes should be released; provided, however, that in all districts outside the fire limits, on streets where the grade exceeds five (5) per cent, it shall be lawful for any person operating vehicles described in Section 41 of this Ordinance to leave same standing against curb, and at right angles to same, with front or rear wheels against curb, providing the length of the vehicle does not obstruct or interfere with street car traffic on such street.

'Scorching' or 'Coasting.'

Section 44. It shall be unlawful for any person to ride or drive any bicycle, tricycle, bicycle-tandem or other vehicle or machine of similar character upon or along any public street unless the feet of the person riding or driving the same shall be kept upon the pedals thereof at all times while such vehicle is in motion; the practice of 'scorching' or 'coasting' is hereby prohibited.

Breaking of Animals on Streets.

Section 45. It shall be unlawful for any person to drive upon the streets any unduly dangerous or partially 'broken' animal or to use the said streets for the purpose of 'breaking' animals, it being the intention of this section to define the words 'broken' and 'breaking' to the act of accustoming animals to saddle and harness for the purpose of subjection.

Intoxicated Persons Driving.

Section 46. It shall be unlawful for any person, while in an intoxicated condition to ride or drive any animal, or to ride, drive or propel any vehicle, or to have charge or control of any animal or vehicle, in any public street.

301 Driving Across Newly Made Pavements.

Section 47. It shall be unlawful for any person to ride or drive, or to cause to be ridden or driven, any animal, or to ride, drive or propel, or cause to be ridden, driven or propelled, any vehicle over or across any newly made pavement in any public street, across or around which pavement there is a barrier, or at, over or near which there is a person or sign warning persons not to drive over or across such pavement, or a sign stating that the street is closed.

Leaving Animals on Streets Without Bit and Bridle.

Section 48. It shall be unlawful for any person to leave, or to cause to be left, any horse, mule, pony or donkey in or upon any public street, unless there shall be in the mouth of such animal a bit attached to a bridle halter, which bridle halter shall be securely fastened on the head of such animal.

Leaving Unsecured Animals on Streets.

Section 49. It shall be unlawful for any person having charge, custody or control of any horse, mule, pony or donkey, to leave such animal or to cause or permit the same to be left, unattended and unsecured in any public street. A horse, mule, pony or donkey left unattended in any street shall be deemed to be unsecured within

the meaning of this Ordinance, unless it shall be securely tied or hitched by a chain, strap or rope fastened to its neck, bridle or halter and to a post or other permanent fastening, or by a chain, strap or rope fastened to its bridle or halter and to a weight of not less than twenty (20) pounds resting upon the ground, or in the case of one or two horses or mules harnessed to a wagon having a brake, by tightly setting the brake on such wagon, backing the horse, mule or team so that the traces shall be loose, pulling the lines taut and securely fastening them to the wagon in such manner that the wagon can be drawn only by means of the lines or chain fastened to the body of vehicle and passing through wheel; or stake in hind wheel of truck.

Hitching to Trees.

Section 50. It shall be unlawful for any person to hitch or tie, or to cause or permit to be hitched or tied, any horse, mule, pony or donkey or other animal to any shade or ornamental tree in any street, park or public place, or to hitch or tie, or to cause or permit to be hitched or tied, any such animal, or to allow the same to stand so near to any shade or ornamental tree as to permit or enable such animal to injure or destroy the same.

Hitching to Lamp Posts.

Section 51. It shall be unlawful for any person to hitch, or tie, or to cause or permit to be hitched or tied, any horse, mule, pony, donkey or other animal to any post used for the support of any lamp used in lighting any public street, park or place.

302 Feeding Animals, Unhitched, on Streets.

Section 52. It shall be unlawful for any person to feed, or to cause to be fed, any horse, mule, pony, donkey or other animal, upon any street, unless such horse, mule, pony, donkey or other animal shall be securely tied or hitched by a chain, strap or rope fastened to its neck, bridle or halter and to a post or other permanent fastening or by chain fastened to body of vehicle and passing through wheels; or stake in hind wheel of truck.

Feeding, Except with Nose-bags.

Section 53. It shall be unlawful for any person to feed, or to cause to be fed, any horse, mule, pony, donkey or other animal upon any public street except by means of a nose-bag fastened upon the head of such animal.

Driving Along or Across Car Tracks so as to Obstruct Cars.

Section 54. It shall be unlawful for any person wilfully to stop, drive or propel, or cause to be stopped, driven or propelled, any

vehicle along or across any street railway or interurban railway track in such manner as unnecessarily to hinder, delay, or obstruct the movement of any car traveling upon such track; provided, however, that vehicles mentioned in Section 16 hereof shall have the right of way when in service responding to a call.

Emission of Smoke, Steam, etc., from Self-propelled Vehicles.

Section 55. It shall be unlawful for any person operating a self-propelled vehicle upon the streets, to permit the motors of the same to operate in such a manner as to visibly emit an unduly great amount of steam, smoke, products of combustion from exhaust pipes or other pipes or openings.

'Mufflers' on Automobiles.

Section 56. It shall be unlawful for any person to ride, drive or propel, or to cause or permit to be ridden, driven or propelled, any motor vehicle, in, upon or along any public street or other public place, or to operate or cause or permit to be operated, the motor in any such vehicle, in any public street or other public place, if such motor, vehicle, or the motor in such vehicle is not provided with a good and sufficient muffler properly attached thereto, or if the exhaust from the motor in such vehicle is ejected otherwise than through such muffler, or if such exhaust is ejected toward the surface of the street or ground.

For the purposes of this section the term 'motor vehicles' shall include automobiles, motorcycles and all other vehicles operated by power other than animal power.

Loud Noises from 'Mufflers.'

Section 57. It shall be unlawful for any person operating a self-propelled vehicle upon the streets, to permit the pipes, 'mufflers' or other devices, to emit the sounds of exhaust in a loud and annoying manner; it being the intention of this section to compel the operation of such self-propelled vehicles in as noiseless a manner as possible.

303 Machinery in Motion on Automobiles at a Standstill.

Section 58. It shall be unlawful for any person to leave unattended upon any public street, alley or other public place any automobile or other motor vehicle while any part of its machinery is running or is in motion.

Section 59. Repealed by Ordinance No. 3495 (New Series), approved November 5, 1915.

Driving Along or Across Car Tracks to Delay Cars.

Section 60. It shall be unlawful for any person wilfully to stop, drive or propel any vehicle along or across any street railway or

over railway tracks in such a manner as to necessarily hinder, delay or obstruct the movement of any car traveling upon such track; provided, however, that vehicles carrying the United States mail, auxiliary fire apparatus belonging to any person, firm or corporation engaged in the business of furnishing gas or electricity to the City and County of San Francisco or to its inhabitants, when such apparatus is responding to a call to a fire, and to any vehicle belonging to any person, firm or corporation engaged in the business of transporting persons to the premises of the persons transported, when such vehicle is responding to a call to a fire or to a burglar alarm, and that vehicles of the Fire and Police Departments, Fire Marshal, Underwriters Fire Patrol and hospital ambulances shall have the right of way when in service or responding to calls.

Catching on Moving Vehicles.

Section 61. It shall be unlawful for any person to, in any manner, catch on, hold, or otherwise attach himself, or any vehicle or object to any moving vehicle unless given permission so to do by the operator of said moving vehicle.

Vehicles Traveling in the Wake of Other Vehicles.

Section 62. It shall be unlawful for any person riding on the streets upon a bicycle or any similar vehicle, or any other vehicle, to travel so closely in the wake of any vehicle in such a manner as to imperil life or limb; or to travel so closely in the wake of any said moving vehicle as not to give the following vehicle ample room in which to stop or turn out in case the preceding vehicle comes to a sudden stop.

Lights on Automobiles.

Section 63. Every motor vehicle other than a motorcycle, while on the public highway, whether in operation or otherwise, during the period from a half hour after sunset to a half hour before sunrise, and at all times when fog or other atmospheric conditions render the operation of vehicles dangerous to the traffic on and use of the highway, shall carry at the front at least two lighted lamps showing white lights visible under normal atmospheric conditions at least five hundred feet in the direction toward which said motor vehicle is faced, and shall also carry at the rear a lighted lamp exhibiting one red light plainly visible for a distance of five
304 hundred feet toward the rear and so constructed and placed that the number plate carried on the rear of such motor vehicle shall be illuminated by a white light in such manner that the number thereon can be plainly distinguished under normal atmospheric conditions at a distance of not less than fifty feet toward the rear. At the times and under the conditions in this section hereinbefore specified, all other vehicles, except motorcycles and bicycles and such vehicles as may be propelled by a pedestrian,

shall carry at the left side thereof a lighted lamp visible front and rear, and from the left, for a distance of not less than two hundred feet.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Lights on Bicycles, etc.

Section 64. At the times and under the conditions hereinbefore specified in Section 63, every motorcycle or bicycle while on the public highway, whether in operation or otherwise, shall carry one lighted lamp, showing a white light visible under normal atmospheric conditions at least two hundred feet in the direction toward which such motorcycle or bicycle is faced, and shall also carry at the rear of such motorcycle or bicycle, one red light, or one red reflex mirror plainly visible from the rear.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Vehicles, Except Motor-driven, to Carry White Light in Front and Rear.

Section 65. Anything hereinbefore to the contrary notwithstanding, it is hereby provided that the front light or lights of every motor vehicle shall be permanently dimmed so as to prevent any glare therefrom which might interfere with the convenience or safety of the use of the highway, or shall be so directed that the center rays thereof shall strike the ground at a distance not to exceed seventy-five feet from the front of such vehicle; provided, that nothing in this section shall be construed to render inoperative the provisions of Sections 63 and 64 relative to the plain visibility of such light or lights in the direction in which such vehicle may be faced.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Section 66. Repealed by Ordinance No. 3495 (New Series), approved November 5, 1915.

Examinations and Permits from Police Commissioners for Drivers of Autos.

Section 67. It shall be unlawful for any person to operate upon the streets any automobile or other form of motor vehicle for the purpose of conveying passengers for hire or otherwise unless such person shall have procured a permit in writing for such privilege from the Board of Police Commissioners of the City and County of San Francisco after having satisfied such Board by a practical test, conducted by a member or members of the Police Department that the applicant for such permit is capable and has the necessary efficiency and ability to operate such a vehicle and is a person of good moral character; and the said Board of Police Com-
305 missioners of the City and County of San Francisco is hereby empowered in its discretion to grant such permit, provided, however, that no permission shall be granted to any person under

eighteen (18) years of age and that all persons to whom permits may or have been granted must always carry such permit and present same for inspection to any regularly authorized officer or official of the City and County of San Francisco when required so to do and that this section shall apply only to drivers or operators of automobiles or other forms of motor vehicles, provided, further, that the provisions of this Section shall not apply to persons operating their own cars for private business or pleasure and who are not in the public hackney or rent service; provded further that any permit may be revoked by the Chief of Police upon second or subsequent conviction of the holder thereof for any violation of the Law, Ordinance or Regulation relating to the operation of motor vehicles; subject, however, to an appeal to the Board of Police Commissioner- from the order of revocation. All permits, granted under this section shall in all cases continue in force for one (1) year from the date of the issuance thereof, unless sooner revoked, as herein set forth, and at the expiration of such period of one (1) year such permits shall be void and of no effect.

Registration of Automobiles.

Section 67½. The Chief of Police shall direct all patrolmen, whether on especial assignment or on regular beats, to note and record on a blank provided for such purpose all motor vehicles driven in a reckless manner or in violation of law, ascertaining and noting the number of the machine, exact hour and date of violation and nature thereof, and description of driver, as near as may be, such record to be turned in to the Chief of the department at the end of each watch. The Chief shall keep a carefully tabulated record of violations, and when it appears that any motor vehicle is habitually driven in violation of laws of the City and State relating to the operation and driving of motor vehicles, the owner or driver, or both, shall be notified to appear before the Chief of Police for inquiry and warning; nothing herein contained, however, to be construed as a waiver of the right to arrest without such notice and warning.—As amended by Ordinance No. 2700 (New Series), approved March 31, 1914.

Driving Automobiles, Bicycles, etc., on Sidewalks.

Section 68. It shall be unlawful for any person to ride or drive, or to cause to be ridden or driven, any horse or other animal, or to ride, drive or propel, or cause to be ridden, driven or propelled, any wagon, bicycle, motorcycle, automobile or other vehicle, except hand carriages for children, upon or along any public sidewalk, or to leave any such animal or vehicle upon any public sidewalk or to permit any such animal or vehicle to stand thereon, or to permit any such animal or vehicle to stand upon any public street in such manner as to obstruct the free use of the roadway of such street.

306 Draining of Gasoline, etc., from Automobiles.

Section 69. It shall be unlawful for any person, company or corporation, or agent of any person, company or corporation, owning, controlling or operating any mobile, automobile or locomobile, or any machine or apparatus using electricity, gasoline or any product of petroleum for its motive power to drain off from the crank or gear case, or from any other part of said machine, upon any public street.

Drip-pans for Automobiles.

Section 70. Every mobile, automobile or locomobile, or any machine or apparatus using electricity, gasoline or any product of petroleum for its motor power, shall have attached thereto a suitable device or devices for the purpose of preventing deposits from leakings or drippings being made upon the pavements or public streets.

Deposit of Kerosene on Pavements.

Section 71. No person or persons, firms or corporations shall deposit, or cause, or allow to be deposited, upon any of the public streets, paved with bituminous rock, naphtha, kerosene or any other product of petroleum, or shall convey or cause to be conveyed, through said public streets so paved, any naphtha, kerosene or other products of petroleum in any tank, can or other vessel whereby the same leaks upon or is deposited upon the said pavement.

Disturbance of Processions, etc.

Section 72. No person shall, without authority of law, interfere with or obstruct the free and uninterrupted passage in, upon, along or through any street of any school procession or funeral cortege or procession or disturb any school or any assemblage of people met for the purpose of a funeral for the burial of the dead.

No parade or procession shall occupy or march on any street unless written notice of the time and route of such procession or parade be given to the Chief of Police not less than twenty-four (24) hours previous to its forming or marching and said Chief of Police may designate the street or streets such procession or parade can occupy; and when so designated the chief officer of such procession or parade shall be responsible that the route designated by the Chief of Police is followed.

The Chief of Police is hereby empowered to establish lines, if he deem it necessary, on both sides of the street along the proposed route over which the parade or procession is to pass and no person or vehicle of any kind, excepting those having accredited badges and the apparatus of the Fire Department responding to an alarm of fire, the vehicles of the Police Department, and Fire Marshal and Auxiliary Fire apparatus belonging to any person, firm or corpora-

tion when such apparatus is responding to a call to a fire, and any vehicle belonging to any person, firm or corporation engaged in the business of transporting persons to the premises of the persons transported when such vehicle is responding to a call to a fire or
307 to a burglar alarm, ambulances, whether of public or private character, or any other vehicle when such vehicle is employed in carrying a sick or injured person to a hospital or other place for relief or treatment and the United States mail wagons shall pass over or through said lines.

The lines at the intersecting streets and crossings along the line of march of such parade or procession shall not be established until the head of the parade or procession is within one (1) block of said crossings and the intersections and said line shall be removed when the parade or procession has passed.

In case of fire, accident or any emergency along the line of march of such parade or procession, the Chief of Police or the police officer, in charge of the detail on the streets along which such parade or procession shall pass is hereby given full power to divert said parade or procession around such fire, accident or emergency, over and along the nearest cross street to such fire, accident or emergency and direct such parade or procession to the line of march of such parade or procession.

The provisions of this section shall not apply to parades or processions of the Police and Fire Departments, the organized militia, the organized naval forces, the independent chartered military organizations, the military and naval forces of the United States, associations composed wholly of soldiers, sailors or marines honorably discharged from the service of the United States, veterans of the National Guard or naval militia, and organizations of the Order of the Sons of Veterans and funerals and funeral processions.

Driving over Drawbridges Faster Than a Walk.

Section 73. It shall be unlawful for any person to ride, drive or propel, or cause to be ridden, driven or propelled, any animal or vehicle faster than a walk over, across or upon any drawbridge in the City and County of San Francisco.—As amended by Ordinance No. 3495 (New Series), approved November 5, 1915.

Prohibiting Opening of Drawbridges Between Certain Hours.

Section 74. It shall be unlawful for any person to turn the Third and Fourth street drawbridges between the hours of 6:30 o'clock and 8:00 o'clock a. m. and 12:00 o'clock m. and 1:00 o'clock p. m., and between 5:00 o'clock and 6:00 o'clock p. m., or at any time that would prevent said bridges from being closed between the hours named.—As amended by Ordinance No. 2244 (New Series), approved April 1, 1913.

Prohibiting Certain Persons from Going Upon Bridges While Open.

Section 75. It shall be unlawful for any person, except employes of this City and County in charge or having control of the Third street bridge and the Fourth street bridge, to go on or remain upon the draw of said bridges during the time the draws of said bridges are open or being opened.

308 Four Miles an Hour Over Eighteenth Street Bridge.

Section 76. It shall be unlawful for any person, except those actually engaged in the performance of municipal business, to ride, drive or propel or cause or permit to be ridden, driven or propelled any animal or vehicle at a rate of speed greater than four (4) miles per hour, across, along or upon the bridge on Eighteenth street, between Iowa and Minnesota streets.

Prohibiting Street Cars on Drawbridges, Except as Provided.

Section 77. It shall be unlawful for any person, firm or corporation, owning or operating any street railway system in the City and County of San Francisco, to permit any street railway car to cross any drawbridge in said City and County, or any employe of such person, firm or corporation, either as conductor or motorman, to permit, propel or cause any street railway car to cross any such drawbridge, except as in this Ordinance provided.

Running Street Cars on Drawbridges.

Section 78. All street railway cars before entering or going upon the draw of any drawbridge shall be brought to a stop at a point not less than fifty (50) nor than one hundred (100) feet distant from the point of opening of the draw of such bridge, and no car shall proceed on its way to and over such drawbridge until the person in charge of such car, either as motorman or conductor, shall have satisfied themselves that the draw of such bridge is closed, and in a position safe to be entered on without risk of damage to said drawbridge or safety to the car and its occupants. Furthermore, not more than one (1) such street railway car shall cross or be upon the draw of any such bridge at any one time.

Bells on Street Cars.

Section 79. It shall be unlawful for any person, firm or corporation owning or having charge of any street car, to propel or cause to be propelled, or to operate or cause to be operated said street car over or upon any public street without having attached thereto a bell or gong of size and weight sufficient to insure its being distinctly heard when rung or sounded at a distance of at least one hundred (100) feet.

Ringing Bells on Street Cars.

Section 80. No bell or gong of any street car shall be rung or sounded when such car is not in motion, except for the purpose of giving the usual signal for starting, nor shall such starting signal be sounded unless for the purpose of actually starting said car in motion. The bell or gong must, however, be rung or sounded when said car or cars are about to cross an intersecting street.

Chief of Police to Detail Traffic Squad.

Section 81. The Chief of Police shall designate and detail a sufficient number of police officers to attend upon streets of the City and County of San Francisco to control, regulate, direct and
309 divert the movement of or order the stoppage of vehicles, street cars and interurban railway cars in or upon such streets in order to prevent congestion of traffic and to prevent accidents.

Any police officer designated or detailed by the Chief of Police to perform such duty shall control, regulate, direct and divert the movement of or order the stoppage of vehicles, street cars and interurban railway cars in or upon such public streets for the purposes herein set forth.

The movement and stoppage of vehicles, street cars and interurban railway cars shall be governed by whistle or other signal given by such police officer as follows: One (1) blast of a police whistle or the raising of the hand indicates that vehicles, street cars and interurban railway cars traveling on any street running in a general northerly and southerly direction shall stop, and that vehicles, street cars and interurban railway cars traveling on any street running in a general easterly and westerly direction may proceed; provided, that street cars and interurban railway cars required to turn from a northerly or southerly direction to an easterly or westerly direction shall proceed upon the sounding of one (1) blast of such whistle and shall stop upon the sounding of two (2) blasts thereof. Two (2) blasts of a police whistle or raising of the hand indicates that vehicles, street cars and interurban railway cars traveling on any street running in a general easterly and westerly direction shall stop and that vehicles, street cars and interurban railway cars traveling on any street, running in a general northerly and southerly direction may proceed; provided, that street cars and interurban railway cars required to turn from an easterly or westerly direction to a northerly or southerly direction shall proceed upon the sounding of two (2) blasts of such whistle and shall stop upon the sounding of one (1) blast thereof. Vehicles, street cars and interurban railway cars shall stop so as not to interfere with the passage of pedestrians at the crossings. Three (3) or more blasts of a police whistle is a signal of alarm and indicates the approach of a fire engine or some other danger, and all vehicles, street cars and interurban railway cars shall stop until permitted by the police officer to proceed.

Drivers of vehicles and motormen of street cars and isterurban railway cars must at all times comply with any direction given by whistle, voice or hand of any police officer as to stopping, starting, approaching or departing from any place in any street in the City and County of San Francisco.

It shall be unlawful for any person driving, using or having the control of any vehicle or for any motorman or other person running, operating or having charge or control of any street car or interurban railway car or train of cars to fail, refuse or neglect to obey the order of any police officer in regard to the regulation, direction or diversion or to moving or stopping any such vehicle or any such street car or interurban railway car or train of cars in or upon any street in the City and County of San Francisco.

310 The Chief of Police shall designate and determine the streets and street crossings or intersections which shall be governed by whistle by the police officers, detailed to enforce the provisions of this Ordinance on such streets and crossings or intersections.

Police Commissioners to Post Copies of Ordinances, etc.

Section 82. The Board of Police Commissioners of the City and County of San Francisco shall cause copies of this Ordinance within thirty (30) days after its passage, to be posted in all livery and other stables, car barns, automobile garages or other places where vehicles are kept for hire within the City and County of San Francisco and shall keep copies of the same at all police stations and distribute same upon application.

Penalty.

Section 83. Any person, firm or corporation who shall violate the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five (5) dollars, and for each succeeding conviction such fine shall be at least five (5) dollars more than the fine last imposed, provided, that no fine shall exceed one hundred (100) dollars, or by imprisonment in the County Jail for a period not exceeding fifty (50) days, or by both such fine and imprisonment.

Repealing Section.

Section 84. Orders Nos. 70, 1611 and 175 (Second Series) and Ordinances Nos. 256, 723, 803, 807, 808, 809, 814, 825, 851, 888, 898, 899, 902, 1088, 1132, 1359, 1367, 1369, 1379, 1380, 1507, 1517, and Ordinances Nos. 339, 575, 629, 649, 1527 and 2128 (New Series), and all other Orders and Ordinances, or parts of Orders and Ordinances, in conflict herewith are hereby repealed.

Section 85. This Ordinance shall take effect thirty (30) days after its passage."

Counsel for the Complainant thereupon offered and there was received in evidence Ordinance No. 3212 N. S. of the City and County of San Francisco, State of California, approved April 29, 1915, regulating the use of the streets of said City and County by self-propelled motor vehicles carrying passengers for hire and providing for the licensing of such vehicles and for a penalty for a violation of said ordinance. Said ordinance reads as follows:

"Be it ordained by the people of the city and county of San Francisco as follows:

311 Section 1. A 'jitney bus' is hereby defined to be a self-propelled motor vehicle, other than a street car, traversing the public streets between certain definite points or termini and conveying passengers for a fixed charge of not more than ten (10) cents between such and intermediate points, and so held out, advertised, or announced. A 'jitney bus' is hereby declared to be a common carrier and is subject to the regulations herein prescribed.

Section 2. Before operating any 'jitney bus' as such, upon any public street, the owner or lessee thereof shall apply for and obtain a permit therefor from the Board of Police Commissioners as herein provided, and the operator or chauffeur thereof shall also obtain an operator's permit as herein provided.

Section 3. Application for a 'jitney bus' permit shall be made in writing and filed with the Chief of Police annually on or before the 15th day of December and shall state:

(*a*) The type of motor vehicle and the name of the manufacturer or popular name thereof;

(*b*) The horsepower thereof;

(*c*) The factory number and state license number thereof;

(*d*) The seating capacity thereof according to its trade rating;

(*e*) The name of the owner, or lessee and of the person to be in immediate charge thereof as operator or chauffeur and the number of his state license;

(*f*) Whether the driver has had thirty (30) days' experience in operating automobiles over the streets of the City and County of San Francisco as hereinafter provided;

(*g*) That the driver is physically qualified to drive a motor car safely and that said driver's hearing and eyesight are unimpaired.

The driver shall pass an oral examination as to knowledge of traffic laws and rules of the City and County.

(*h*) The signature of each applicant shall be acknowledged before a notary public or some other officer or magistrate duly authorized to administer oaths.

At the same time and in the same manner as herein provided application shall be made to renew the chauffeur's permit by each and every operator or chauffeur of a 'jitney bus.'—As amended by Ordinance No. 3288 (New Series), approved June 11, 1916.

Section 4. In order to insure the safety of the public, it shall be unlawful for any person to drive or operate such 'jitney bus' or to obtain a permit therefor unless he shall have given and there is in full force and effect at all times while such person is driving and

operating such 'jitney bus' on file with the Police Commission, either (*a*) a bond of the owner or lessee of said 'jitney bus' with a responsible surety company or association authorized to do business under the laws of the State of California, in the sum of ten thousand (10,000) dollars, conditioned that the owner or lessee of said 'jitney bus' for which a permit has been applied (giving its manu-
312 facturer's name and number and State license number) will pay all loss or damage that may result to any person or property from the negligent operation of or defective construction of said 'jitney bus,' or which may arise or result from any violation of any of the provisions of this Ordinance or the laws of the State of California. The recovery upon said bond shall be limited to five thousand (5,000) dollars for the injury or death of one (1) person and to the extent of ten thousand (10,000) dollars for the death or injury of two (2) or more persons in the same accident and to the extent of one thousand (1,000) dollars for the injury or destruction of property. Such bond shall be given to the City and County of San Francisco and shall inure to the benefit of any and all persons suffering loss or damage either to person or property as herein provided, and suit may be brought in any court of competent jurisdiction upon said bond by any person or persons or corporation suffering any loss or damage as herein provided. Such bond shall be approved by the Police Commission, and the permission granted by said Police Commission as herein provided shall recite that the permit is issued upon condition and in consideration of the filing of said bond. Said bond shall be a continuing liability, notwithstanding any recovery thereon, and if at any time, in the judgment of the Police Commission, said bond is not sufficient for any cause, the Commission may require the party to whom permit is issued as herein provided to replace said bond with another bond satisfactory to the Commission, and in default thereof said permit may be revoked; or (*b*) a policy of insurance in a company authorized to do business in the State of California, insuring said owner or lessee of said 'jitney bus' against loss by reason of damage that may result to any person or persons or property from the operation of said 'jitney bus,' said policy of insurance to be in limits of five thousand (5,000) dollars for any one (1) person injured or killed; and, subject to such limit for each person, a total liability of ten thousand (10,000) dollars in case of any one (1) accident resulting in bodily injury or death to more than one (1) person. Said policy of insurance must also provide insurance to the extent of one thousand (1,000) dollars for the injury to or destruction of any property of third parties.

Said policy shall guarantee payment of any final judgment rendered against the said owner or lessee of said 'jitney bus' within the limits herein provided, irrespective of the financial responsibility or any act of omission of said 'jitney bus' owner or lessee.

If, at any time, said policy of insurance be canceled by the issuing company, or the authority of said issuing company to do business in the State of California be revoked, the Police Commission shall require the party to whom permit is issued, as herein provided, to re-

place said policy with another policy satisfactory to the Commission, and in default thereof said permit may be revoked.

313 Section 5. The Police Commission shall, without unnecessary delay, hear such application and shall grant the same unless it shall appear:

(*a*) That the bond or insurance policy herein required is insufficient to properly safeguard the public interest and safety.

(*b*) That the vehicle for which the permit is applied for is inadequate or unsafe for the purpose intended or insufficiently equipped with skid chains or other safety devices.

(*c*) That the operator is incompetent or has not had sufficient experience in driving an automobile in the City and County of San Francisco, or is not of good moral character, or has heretofore violated any of the provisions of this Ordinance or the laws of the State of California.

(*d*) That the driver is not physically qualified to drive a motor car safely or possesses defective eyesight or hearing.

The permit shall be numbered, and such number, not less than three (3) inches in height and one-half (½) inch wide, shall be affixed to the bus with such conspicuousness as may be required by the Chief of Police.

All metal permit tags shall be obtained from the office of the Tax Collector upon receipt of proper notification by the latter office from the Chief of Police.--As amended by Ordinance No. 3288 (New Series), approved June 11, 1915.

Section 6. Upon the granting of the permit, as hereinbefore provided, the holder thereof shall present the same to the Tax Collector, who shall furnish the applicant with the necessary metallic bus permit and chauffeur's badge to enable applicant to lawfully operate his 'jitney bus'; provided, however, that before these permits are issued by the Tax Collector, the operator of each and every 'jitney bus' herein described shall pay to said Tax Collector a license fee as follows:

(*a*) For each 'jitney bus' capable of seating five (5) or less passengers, the sum of ten (10) dollars per year, payable in advance.

(*b*) For each 'jitney bus' capable of seating more than five (5) and less than eight (8) passengers, the sum of fifteen (15) dollars per year, payable in advance.

(*c*) For each 'jitney bus' capable of seating more than seven (7) and less than sixteen (16) passengers, the sum of twenty-five (25) dollars per year, payable in advance.

(*d*) For each 'jitney bus' seating more than fifteen (15) passengers, the sum of forty (40) dollars per year, payable in advance.

The foregoing license fees are fixed as being necessary for the purpose of regulation and to provide for the necessary inspection under an enforcement of the provisions of this Ordinance.—As amended by Ordinance No. 3288 (New Series), approved June 11, 1915.

Section 6*a*. On or before the 20th day of December in each year the Auditor shall furnish the Tax Collector with a sufficient

314 number of metallic chauffeur's badges, 'jitney bus' permits, and 'jitney bus' licenses to enable the Tax Collector to meet

the demands made upon him for these permits and licenses during the next calendar year. The design and quality of these badges and licenses shall meet the approval of the Tax Collector.—New Section added by Ordinance No. 3288 (New Series), approved June 11, 1915.

Section 6*b*. All 'jitney bus' licenses issued under the provisions of Section 6 of this Ordinance shall date from the first day of January of each year and shall be issued for one (1) year from the aforesaid date. Before issuing a license for any public passenger vehicle the Tax Collector must collect from the owner thereof, if he has failed to obtain such license in the month of January, a penalty of fifty (50) cents per month for each month that such owner is delinquent in the payment of the license, provided that where the Tax Collector has good and sufficient evidence that the applicant has not used the passenger vehicle prior to the date when application is made for a license, no penalty shall be imposed in such instance.—New Section added by Ordinance No. 3288 (New Series), approved June 11, 1915.

Section 7. No person except one holding a certificate issued by the authority of the State of California, and a permit granted by the Board of Police Commissioners of the City and County of San Francisco shall be permitted to operate any 'jitney bus' within the City and County of San Francisco. After being granted a permit by the Board of Police Commissioners of the City and County of San Francisco, said applicant shall obtain from the office of the Tax Collector upon the deposit of one (1) dollar, a metal numbered badge, said badge to be worn conspicuously by the operator or chauffeur at all times while operating a 'jitney bus.' In addition, he shall be supplied by the Tax Collector with an identification card giving his name and address, which will be the record of his permit granted by the Board of Police Commissioners. All licenses and permits under this Ordinance shall expire on December 31 of each year.—As amended by Ordinance No. 3288 (New Series), approved June 11, 1915.

Section 8. It shall be unlawful:

(*a*) To drive or operate, or cause to be driven or operated, any 'jitney bus' upon or along any street unless there is outstanding a valid license for each such bus obtained as in this Ordinance provided.

(*b*) To drive or operate, or cause to be driven or operated, a 'jitney bus' without the City license number thereof displayed in a conspicuous place and in figures not less than three (3) inches in height and one-half (½) inch wide upon the right hand side of the body thereof.

(*c*) To drive or operate, or cause to be driven or operated, any 'jitney bus' while there is attached thereto any trailer or any other passenger carrying vehicle.

(*d*) To drive or operate any motor bus unless there is displayed upon the wind-shield, or other prominent or fixed portion of
315 said motor bus, words, in letters at least three (3) inches in height and one-half (½) inch wide and plainly written so they may be distinctly seen and read, showing that such vehicle is a

'jitney bus.' Such sign shall be approved by the Board of Police Commissioners and the Chief of Police.

(e) To permit passengers to ride on the running board or fenders of any 'jitney bus'; and it shall also be unlawful for any person to ride on the running board of any 'jitney bus.' As amended by Ordinance No. 3288 (New Series), approved June 11, 1915.

Section 9. Any permit shall be revoked by the Board of Police Commissioners for any violation of the provisions of this Ordinance, for the failure to pay any judgment for damages arising from the unlawful or negligent operation of the 'jitney bus' for which the permit was issued, or for a violation of the Traffic Ordinances of the City and County of San Francisco or laws of the State of California now in force or hereafter adopted. The Board of Police Commissioners, in the exercise of a sound and reasonable discretion, and when the public interest and safety may require, may revoke any permit issued under the provisions of this Ordinance.

Section 10. Any operator or chauffeur who operates any 'jitney bus' while under the influence of liquor, or who operates his vehicle in a reckless and dangerous manner, or who violates this Ordinance or the Traffic Ordinances in any manner, or any Ordinance of the City and County of San Francisco or the laws of the State of California now in force or hereafter adopted, shall forfeit his right to the badge provided in Section 7, and any owner of any 'jitney bus' thereafter permitting such chauffeur or operator to operate or remain in charge of any bus shall forfeit the permit issued for the vehicle so operated.

Section 11. It shall be unlawful for any person owning or having in charge or operating, or causing to be operated, any 'jitney bus' over or upon any public street without having attached thereto a bell or horn of size and weight sufficient to insure its being distinctly heard when rung or sounded at a distance of at least one hundred (100) feet. The bell or horn must be rung or sounded when such 'jitney bus' is about to cross an intersecting street.

Section 12. Every person owning or operating, or causing to be operated, any 'jitney bus' in the City and County of San Francisco shall thoroughly wash each car, when so operated, at least once a week, and shall also carefully sweep and clean each of said 'jitney buses' daily, and whenever required in writing by the Board of Health of the City and County of San Francisco every person owning or operating, or causing to be operated, any 'jitney bus' within the limits of said City and County shall fully disinfect each 'jitney bus' so operated by spraying said 'jitney bus' with an efficient disinfectant.

Section 13. No person shall operate or cause to be operated any 'jitney bus' in the City and County of San Francisco except at the rates of speed fixed by the laws of the State of California.

316 Nothing in this section contained, however, shall be so construed as to permit any person to drive any such 'jitney bus' at a greater speed than is prudent and reasonable, having regard for the existing traffic conditions or so as to endanger either person or property.

Section 14. It shall be unlawful for any person owning or operating, or causing to be operated, any 'jitney bus' within the City and County of San Francisco to allow or permit any incompetent or inexperienced person to act as the driver of such 'jitney bus.'

It shall be unlawful for any person not having had previous experience to operate any 'jitney bus' in the streets of the City and County of San Francisco unless said person shall have had at least thirty (30) days' experience in the operation of an automobile in the City and County of San Francisco.

Section 15. It shall be unlawful for any driver of a 'jitney bus' in the City and County of San Francisco to smoke any cigar, pipe or cigarette, or to burn tobacco while passengers are occupying any of the seats in such vehicle.

Section 16. Every person operating or causing to be operated any 'jitney bus' in the City and County of San Francisco is hereby required to permit and allow firemen and policemen in the employ of the City and County of San Francisco, while engaged in the actual discharge of their duties, to ride in any vacant seat on the 'jitney bus' so owned or operated by such person without paying any sum or sums of money for fare or otherwise for riding on said 'jitney bus'; and no person owning or operating any 'jitney bus' in said City and County shall demand or collect a fare from any fireman or policeman as in this section provided.

Section 17. Before taking any descending grade of five (5) per cent or over, the speed of any such 'jitney bus' shall be reduced so as to test the working of the brakes thereof, and the brakes on all 'jitney buses' in use must be inspected and tested daily by competent inspectors employed by the person or persons owning or operating, or causing to be operated, said 'jitney bus.'

Whenever a 'jitney bus' approaches the track of a steam railroad it must, within twenty-five (25) feet of the nearest rail of said steam railroad, come to a full stop, and the driver of said 'jitney bus' must stop, look and listen, and be satisfied that no engine, car, or train is approaching in the direction of said 'jitney bus'; he may then proceed, but under no circumstances shall a 'jitney bus' proceed without observing the precautions required by this section.

Section 18. It shall be unlawful for any person to operate or cause to be operated any 'jitney bus' unless the same be equipped with adequate brakes and non-skidding devices when operated upon a slippery pavement.

Section 19. It shall be unlawful for any person owning or operating or driving, or causing to be operated or driven, any 'jitney bus' to permit the same to remain standing upon the street for the purpose of loading or unloading passengers unless the side of said
317 'jitney bus' nearest to the right hand curb of said street shall be at least within two (2) feet distant therefrom.

Section 20. All persons who, at the time of the approval of this Ordinance, shall have paid for the year 1915, the license tax provided in Ordinance 1710, approved December 28, 1905, shall be exempt from the license fee fixed in Section 6 hereof until January 1, 1916.

Section 21. The Police Department is hereby empowered in cases

of fire, accidents, parades, obstruction on, breaks in, or repairs of streets, or any emergency, or to prevent accidents, or congestion of traffic, or in case of public necessity, to divert and route 'jitney buses' upon such streets as in its judgment is necessary.

Section 22. If any section, sub-section, sentence, clause, or phrase of this Ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this Ordinance. The Board of Supervisors hereby declares that it would have passed this Ordinance and each section, sub-section, sentence, clause and phrase thereof irrespective of the fact that any one or more other sections, sub-sections, sentences, clauses, or phrases be declared unconstitutional or invalid.

Section 23. Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred (100) dollars or by imprisonment in the County Jail for a period of not more than three (3) months, or by both such fine and imprisonment.

Section 24. This Ordinance shall take effect and be in force ten (10) days from and after its passage."

Counsel for the Complainant thereupon offered and there was received in evidence Ordinance No. 549 of the City and County of San Francisco, approved August 13, 1902, providing that street railroad cars shall be operated within the City and County of San Francisco by competent and experienced motormen, gripmen and conductors. Said ordinance reads as follows:

"Be it ordained by the people of the City and County of San Francisco as follows:

Section 1. It shall be unlawful for any person, company or corporation owning or operating street railroad cars within the City and County of San Francisco, or any officer or agent of any such person, company or corporation to allow or permit any incompetent or inexperienced person to act as motorman, gripman or conductor in the operation of their street railroad cars within the City and County of San Francisco.

Section 2. It shall be unlawful for any person, not having had previous experience, to act as motorman, gripman or con-
318 ductor on street railroad cars within the City and County of San Francisco unless said person shall have had at least seven (7) days' experience in such capacity in this City and County, under the instruction and guidance of a competent and experienced motorman, gripman or conductor, as the case may be; provided, however, that this section shall not apply to the service of motormen, gripmen or conductors on street railroad cars operated upon tracks not in readiness for the transportation of passengers.

Section 3. The term competent and experienced motorman, gripman or conductor shall be defined to mean one who has had seven (7) days' experience as expressed in Section 2 of this Ordinance, and any person not having had such experience shall be deemed to be incompetent and inexperienced.

Section 4. Any person, company or corporation, or any officer or agent of any person, company or corporation, violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not exceeding five hundred (500) dollars, or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment.

Section 5. This Ordinance shall take effect and be in force from and after its passage."

Counsel for the Complainant thereupon offered and there was received in evidence Ordinance No. 221 of the City and County of San Francisco, State of California, approved January 29, 1901, establishing the rates of fare to be charged by any person, association or corporation engaged in the transportation of passengers on street railroads, to pupils under the age of 18 years attending the public or private schools of said City and County. Said Ordinance reads as follows:

"Be it ordained by the people of the City and County of San Francisco as follows:

Section 1. The rates of fare to be charged by any person, association or corporation engaged in the transportation of passengers on street railroads within the City and County of San Francisco, for the transportation of pupils under the age of eighteen (18) years, who attend the public or private schools thereof between any given point from or to which it is necessary for them to ride in traveling to and from the school houses within said City and County of San Francisco, in which they attend, shall not exceed one-half (½) the regular fare, charged by such person, association or corporation engaged in the transportation of passengers on street railroads, for the transportation of other passengers between said points.

319 Section 2. Tickets for the transportation of pupils as aforesaid shall be sold in packages of twenty (20) tickets each, and shall be received on street railroads between the hours of 7:30 o'clock a. m. and 10:00 a. m.; 12:00 o'clock m. and 1:30 o'clock p. m.; 2:30 o'clock p. m. and 4:30 o'clock p. m.; 6:30 o'clock p. m. and 9:30 o'clock p. m., during the days in which said schools are in session; and shall be available in actual passage to and from school, with such privileges of transfers as are enjoyed by other passengers conveyed by said persons, associations or corporations engaged in the transportation of passengers on street railroads, subject to all reasonable regulations which they may impose not inconsistent with the provisions of this Ordinance.—As amended by Ordinance No. 500, approved June 5, 1902. In effect July 5, 1902.

Section 3. Any pupil under the age of eighteen (18) years attending any public or private school in the City and County of San Francisco desiring the privileges herein provided, shall secure from the principal or head teacher of the school which said pupil attends, a certificate showing that said pupil is in actual and regular attendance therein, which certificate must be presented to said person, association or corporation engaged in the transportation of passengers on street railroads in order to entitle said pupil to the afore-

said tickets at the reduced rate of fare provided for in Sections 1 and 2 of this Ordinance.

Section 4. Any person, association or corporation engaged in the transportation of passengers on street railroads violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred (100) dollars, or by imprisonment in the County Jail not exceeding fifty (50) days, or by both such fine and imprisonment.

Section 5. This Ordinance shall take effect sixty (60) days after its passage."

Counsel for the Complainant thereupon offered and there was received in evidence Ordinance No. 2731 of the City and County of San Francisco, State of California, approved January 17, 1894, requiring all street railroad companies to permit and allow mail carriers in the employ of the United States Government to ride free while engaged in the actual discharge of their duties. Said Ordinance reads as follows:

"The people of the city and county of San Francisco do ordain as follows:

Section 1. Under and pursuant to the various Orders passed by this Board granting street-railroad franchises to various persons and corporations, and under and pursuant to an Act of the Legislature of the State of California, approved February 27, 1893, being
320 Chapter XXVII of the Statutes of California of the year 1893, all street railroad corporations operating street railroads in this City and County, on and after the passage of this Order, are hereby required to permit and allow mail carriers in the employ of the United States Government at all times while engaged in the actual discharge of duty to ride on the cars of such railroad without paying any sum of money for fare or otherwise.

Section 2. Any agent or employe of any street railroad corporation demanding and collecting fare in violation of this Order shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall for each violation be fined a sum not exceeding one hundred (100) dollars or be imprisoned in the County Jail for a period not exceeding thirty (30) days, or by both such fine and imprisonment."

Counsel for Complainant thereupon offered and there was received in evidence Ordinance No. 1674 of the City and County of San Francisco, State of California, approved November 29, 1905, regulating the operation of street railway cars by limiting their speed and providing for the character of their brakes and fixing penalties for the violation of said ordinance. Said ordinance reads as follows:

"Be it ordained by the people of the city and county of San Francisco as follows:

Section 1. It shall be unlawful for any person, company or cor-

poration to operate street railway cars at a greater speed than ten (10) miles per hour within that portion of the City and County of San Francisco, bounded as follows, to wit:

Commencing at the northerly terminus of Larkin street where it enters the waters of San Francisco Bay, and running thence southerly along the easterly line of Larkin street to its junction with Market street; thence across Market street and along the easterly line of Ninth street to Division street; thence along the northeasterly line of Division street to Townsend street; thence along the northerly line of Townsend street to the waters of San Francisco Bay; thence following the outer boundaries of the water front of San Francisco to the point of commencement.

Section 2. It shall be unlawful for any person, company or corporation to operate street railway cars at a greater speed than twelve (12) miles per hour in that portion of the City and County of San Francisco bounded as follows, to wit:

Commencing at the northerly terminus of Devisadero street where it enters the waters of San Francisco Bay, and running thence southerly along the westerly line of Devisadero street to Du-
321 boce avenue; thence easterly along the southerly line of Duboce avenue to Castro street; thence southerly along the westerly line of Castro street to Eighteenth street; thence easterly along the southerly and westerly lines of Eighteenth street to the waters of San Francisco Bay; thence following the outer boundaries of the water front of San Francisco to the point of commencement; excepting herefrom, however, that portion of the City and County of San Francisco in the last paragraph described, and which excepted portion covers the so-called 'ten-mile' district.

Section 3. It shall be unlawful for any person, company or corporation to operate street railway cars at a greater speed than fifteen miles per hour in that portion of the City and County of San Francisco bounded as follows, to wit:

Commencing at the northerly terminus of Devisadero street, where the same enters the waters of San Francisco Bay, and running thence southerly along the westerly line of Devisadero street to Duboce avenue; thence easterly along the southerly line of Duboce avenue to Castro street; thence southerly along the westerly line of Castro street to Eighteenth street; thence westerly along the southerly line of Eighteenth street to Stanyan street; thence northerly along the westerly line of Stanyan street to Fulton street; thence westerly along the southerly line of Fulton street to Fifteenth avenue; thence northerly along the westerly line of Fifteenth avenue to the Presidio wall; thence easterly along the Presidio wall to Pacific avenue; thence easterly along the northerly line of Pacific avenue to Lyon street; thence northerly along the westerly line of Lyon street to the waters of San Francisco Bay; thence along the outer boundaries of the water front of San Francisco to the point of commencement.

Also, commencing at the easterly terminus of Eighteenth street, where the same enters the waters of San Francisco Bay, and running thence westerly along the southerly and westerly line of Eighteenth

street to Castro street; thence southerly along the westerly line of Castro street to Thirtieth street; thence easterly along the southerly line of Thirtieth street to Mission street; thence northeasterly along the southeasterly line of Mission street to Army street; thence easterly along the southerly line of Army street to the waters of San Francisco Bay; thence along the outer boundaries of the water front of San Francisco to the point of commencement.—As amended by Ordinance No. 876 (New Series), approved September 23, 1909.

Section 4. In addition to the requirements of Section 501 of the Civil Code of California, it shall be unlawful for any person, company or corporation to operate any car within the City and County of San Francisco weighing more than eighteen (18) tons, unless such car shall be equipped with both air and hand brakes.

Section 5. Nothing in this Ordinance shall be so construed as to limit, impair or repeal the provisions of an Act of the Legis-
322 lature of the State of California, entitled 'An Act to Promote the safety of employes and passengers upon street railroads by compelling equipment of cars and dummies with fenders and brakes, and to prescribe penalties.' Approved March 22, 1899.

Section 6. Any person, company or corporation who shall violate any of the provisions of this Ordinance shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not to exceed five hundred (500) dollars or by imprisonment in the County Jail for not more than six (6) months, or by both such fine and imprisonment.

Section 7. All Ordinances and parts of Ordinances, in so far as they regulate or attempt to regulate the speed of street railway cars within the limits of the City and County of San Francisco, are hereby repealed.

Section 8. This Ordinance shall take effect and be in force from and after its passage."

Counsel for the Complainant thereupon offered and there was received in evidence Ordinance No. 581 N. S. of the City and County of San Francisco, State of California, approved October 23, 1908, regulating street railroads and cars in the City and County of San Francisco and prescribing rules and regulations for the protection of the public from danger and inconvenience in the operation of such railroads. Said ordinance reads as follows:

"Be it ordained by the people of the city and county of San Francisco as follows:

Section 1. All persons, firms and corporations engaged in the business of operating street cars propelled by electric power in the City and County of San Francisco, for the transportation of passengers, shall, between the hours of 5:00 o'clock a. m. and 1:30 o'clock a. m., daily, provide a sufficient number of cars to transport with safety, comfort and convenience all passengers boarding the same.

Section 2. All persons, firms and corporations engaged in the business of operating street cars in the City and County of San Francisco, for the transportation of passengers, now maintaining an

'Owl' or all-night service, shall continue to maintain such service, and may extend the same, but they shall not discontinue or curtail such service without the consent of the Board of Supervisors of said City and County.

Section 3. The cars on all lines in said City and County of San Francisco must be run on a headway which will, at all times, insure the transportation of passengers with safety, comfort and convenience.

Section 4. In turning corners, the speed of all cars, except those propelled by wire cable, shall be reduced to four (4) miles per hour.

323 Section 5. Every electric passenger car shall be equipped with a printed sign or symbol large enough to be discerned in the day time by persons with ordinary sight three hundred (300) feet distant from the car so equipped.

The provisions of this section shall go into effect sixty (60) days from and after the date of the passage of this Ordinance.

Section 6. Between sunset and sunrise every electric car shall be equipped with a lighted transparency, upon which shall be printed a numbered sign or symbol large enough to be discerned in clear weather and at night time by persons with ordinary sight three hundred (300) feet distant.

The provisions of this section shall go into effect sixty (60) days from and after the date of the passage of this Ordinance.

Section 7. The symbols required by the provisions of Sections 5 and 6 of this Ordinance shall be so numbered that the cars operated on different lines can be readily distinguished.

A notice shall be posted conspicuously in each electric car in operation showing the numbers designating the various lines as follows, to wit:

Sutter street, No. 1; Sutter and Sacramento streets, No. 2; Sutter and Jackson streets, No. 3; Eddy street and Ocean, No. 4; McAllister street, No. 5; Masonic avenue, No. 6; Haight street, No. 7; Market street, No. 8; Valencia street, No. 9; Guerrero street, Glen Park, No. 10; Mission and Twenty-fourth streets, No. 11; Ingleside, No. 12; Cemeteries, No. 14; Third and Kearny streets, No. 15; Kentucky street, No. 16; Ninth and Polk streets, No. 17; Mission and Polk streets, No. 18; Bryant and Polk streets, No. 19; Ellis and O'Farrell streets, No. 20; Hayes and Eddy streets, No. 21; Fillmore street, No. 22; Fillmore and Mission streets, No. 23, Mission street and Chutes, No. 24.

Section 8. Every car shall be provided with two (2) sand-boxes, one (1) on each end of the car, and which shall at all times contain a sufficient quantity of dry sand to last at least one (1) round trip. Such sand-boxes shall be placed near the motorman, or gripman, or other person operating the car, so that the sand therein can, whenever necessary, be by him released and caused to flow upon the rails.

Section 9. Every car shall be provided with headlights, between sunset and sunrise. The lights shall be sufficiently bright to en-

able persons with ordinary sight to readily discern the light in clear weather two (2) blocks away.

Section 10. Before taking any descending grade of five (5) per cent or over, the speed of the car must be reduced, so as to test the working of the brakes.

Section 11. The air brakes and hand brakes on all cars in use must be inspected and tested daily by competent inspectors employed by the persons, firm or corporation operating the car.

324 Section 12. Whenever a car approaches the track of a steam railroad it must, within twenty-five (25) feet of the nearest rail of such steam railroad, come to a full stop. The conductor must leave the car, approach close to the steam railroad track, and stop and look and listen; and if satisfied that no engine, car or train is approaching in the direction of the street railroad track, he must signal the motorman, gripman, or other person in charge of the car to go ahead. Under no circumstances shall the car proceed without such signal.

In lieu of compliance with the provisions of this section, all persons, firms and corporations operating street railroads in said City and County may employ a watchman or flagman at the point of intersection of the street railroad tracks, and the steam railroad tracks, and such watchman or flagman shall give the necessary warning of the approach of any engine, train or car on such steam railroad track.

Section 13. The system of transfers in vogue on the 1st day of September, 1908, on all and each of the street car lines in said City and County of San Francisco is hereby established as the transfer system for the future. Such system shall not be changed by curtailing any of the rights of privileges of passengers, but such transfer system may be extended for the benefit of passengers.

Whenever in the opinion of the Board of Supervisors the safety, comfort or convenience of the public requires it, said Board may change said system, and adopt rules and regulations in relation to transfers and the rights and privileges of passengers thereunder.

Passengers on the following street railroad lines as the same were operated by the United Railroads of San Francisco on the 1st day of September, 1908, shall be entitled to transfers from the following lines, at the following points and in the following directions, to wit:

"United Railroads of San Francisco.

Bosworth Street Line.

Eastbound to Diamond street, north or south; Mission street, north or south.

Westbound to Diamond street, south.

Bryant Street Line.

Inbound to Howard street, north; Folsom street, north or south; Twenty-fourth street, east; Sixteenth street, east or west; Tenth street,

north; Bryant street, east, at Tenth street; Ninth street, north; Eighth street, north; Fifth street, north; Fourth street, north or south; Third street, north or south; Brannan street, east, at Second street; Bryant street, east, at Second street; Folsom street, east, at Second Street; Howard street, east, at Second street; Mission street, east, at Second street; Market street, east; Market street, west (not good on Valencia cars); Montgomery street, north; Post street, east.

325 Outbound to Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, west; Brannan street, east; Third street, south; Fourth street, north or south; Fifth street, north; Sixth street, north; Eighth street, north; Ninth street, north or south; Sixteenth street, east or west; Twenty-fourth street, east or west; Folsom street, south; Mission street, south at Twenty-sixth street.

Bryant and Polk Streets Line.

Northbound to Howard street, north; Folsom street, north or south; Twenty-fourth street, east or west; Sixteenth street, east or west; Bryant street, east, at Tenth street; Harrison street, east or west; Folsom street, east; Howard street, east; Mission street, east; Market street, east; Market street, west (not good on Valencia cars); Hayes street, east or west; McAllister street, east or west; Turk street, east; Eddy street, west; Ellis street, east; O'Farrell street, west; Sutter street, east or west; Sacramento street, east or west; Washington street, east; Jackson street, west; Union street, east or west.

Southbound to Union street, east or west; Jackson street, west; Washington street, east; Sacramento street, east or west; Sutter street, east or west; O'Farrell street, west; Ellis street, east; Eddy street, west; Turk street, east; McAllister street, east or west; Hayes street, east or west; Market street, east or west; Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, east or west; Bryant street, east, at Tenth; Sixteenth street, east or west; Twenty-fourth street, east; Folsom street, south; Mission street south.

Castro Street Extension Line.

Southbound to Twenty-fourth street, west; Twenty-fourth street, east (good only for passengers paying cash fare or presenting transfers from eastbound Eighteenth street cars).

Northbound to Twenty-fourth street, east or west; Eighteenth street, east or west; Castro street, north.

Cemeteries Line.

Inbound to San Jose avenue; north; Onondaga street, west; Bosworth street, west; Twenty-ninth street, west; Valencia street, north; Twenty-sixth street, east; Twenty-second street, east or west; Sixteenth street, east or west; Fourteenth street, east or west, to Eight-

eenth street line; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth street, north or south; Fifth street, north or south; Fourth street, north or south; Third street, north or south; Second street, north.

Outbound to Second street, south; Third street, south; Third street, north (not good on Ferry cars); Fourth street, north or south; Fifth street, south; Sixth street, south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, west; Sixteenth street, east or west; Twenty-second street, east or west; Twenty-ninth street, west; Bosworth street, west; Onondaga street, west.

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Clement Street Line.

Eastbound to Eighth avenue, south; Sixth avenue, north or south; Sacramento street, east at Walnut street; California street, west to Sutter street line.

Westbound to Sixth avenue, south; Eighth avenue, south.

Devisadero Street Line.

Northbound to Jackson street, east or west (not good on outbound cars).

Southbound to Devisadero street, south; Sacramento street, east or west (not good on inbound cars).

Eighth and Eighteenth Streets Lines.

Inbound to Kentucky street, north; Bryant street, south; Sixteenth street, west at Bryant street; Tenth street, north or south; Ninth street, north or south; Bryant street, east at Eighth street; Harrison street, west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Bryant street, north or south, at Sixteenth street; Folsom street, north or south, at Sixteenth street; Howard street, north or south, at Sixteenth street; Mission street, north or south, at Sixteenth street; Sixteenth street, west.

Outbound to Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, west; Bryant street, east; Tenth street, south; Bryant street, south at Sixteenth street; Sixteenth street, west; Kentucky street, north, at Eighteenth street; Railroad avenue, south; Folsom street, north or south, at Sixteenth street; Bryant street, north or south, at Sixteenth street.

Eighteenth Street Line.

Inbound to Clayton street, south; Frederick street, east; Castro street, north or south; Guerrero street, south; Sixteenth street, east or west; Valencia street, north or south; Mission street, north; Mission street, south (not good on Twenty-fourth street cars); Howard street, north or south; Folsom street, north or south; Tenth street,

north or south; Ninth street, north or south; Eighth street, north or south.

Outbound to Ninth street, north or south; Tenth street, north or south; Folsom street, south; Howard street, south; Mission street, south; Valencia street, south; Sixteenth street, east or west; Guerrero street, south; Castro street, south; Frederick street, east; Clayton street, south; Stanyan street, south.

Ellis and Ocean Line.

Inbound to Stanyan street, south; Carl street, east; Waller street, east; Haight street, east; Stanyan street, north; Page street, east; Hayes street, west; McAllister street, east or west; Turk street, east; Devisadero street, north; Fillmore street, north or south; Larkin street, north or south; Leavenworth street, north or south; Taylor street, north or south; Powell street, north; Market street, east; Market street, west, to Valencia and Castro streets lines; Fourth street, south; Mission street, east or west; Howard street, east
327 or west; Folsom street, east or west; Bryant street, east or west; Brannan street, east; Third street, south.

Out bound to Brannan street, east or west; Bryant street, east or west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Powell street, north; Taylor street, north or south; Leavenworth street, north or south; Larkin street, north or south; Fillmore street, north or south; Devisadero street, north; McAllister street, west; Hayes street, west; Devisadero street, south; Masonic avenue, south; Waller street, east; Stanyan street, south; H street, west.

Fillmore Street Line.

Northbound to Folsom street, north or south; Howard street, north or south; Mission street, north or south; Valencia street, north or south; Guerrero street, north or south; Market street, east or west; Haight street, east or west; Oak street, west; Hayes street, east; McAllister street, east or west; Turk street, east; Eddy street, west; Ellis street, east; O'Farrell street, west; Sutter street, east or west; Sacramento street, west; Washington street, east; Jackson street, west; Fillmore street, north, at Broadway.

Southbound to Jackson street, west; Washington street, east; Sacramento street, west Cutter street, east or west; O'Farrell street, west; Ellis street, east; Eddy street, west; Turk street, east; McAllister street, east or west; Hayes street, east; Oak street, west (not good on Richmond cars); Haight street, east or west; Market street, east or west; Guerrero street, north or south; Valencia street, north or south; Mission street, north or south; Howard street, north or south; Folsom street, north or south; Bryant street, north or south; Sixteenth street, east, at Bryant street.

Fillmore Hill Line.

Northbound to Union Street, west.
Southbound to Fillmore street, south; Pacific avenue, east or west.

Fillmore and Mission Line.

Northbound to Twenty-sixth street, east; Mission street, north, at Sixteenth street; Sixteenth street, east; Valencia street, north; Guerrero street, north; Market street, east or west; Haight street, east or west; Oak street, west; Hayes street, east; McAllister street, east or west; Turk street, east; Eddy street, west; Ellis street, east; O'Farrell street, west; Sutter street, east or west; Sacramento street, west; Washington street, east; Jackson street, west; Fillmore street, north, at Broadway.

Southbound to Jackson street, west; Washington street, east; Sacramento street, west; Sutter street, east or west; O'Farrell street, west; Ellis street, east, Eddy street, west; Turk street, east; McAllister street, east or west; Hayes street, east; Oak street, west; Haight street, east or west; Market street, east or west; Guerrero street, north or south; Valencia street, north or south; Mission street, north Sixteenth street, east; Twenty-ninth street, west; Mission street, south.

328 Folsom Street Line.

Inbound to Twenty-sixth street, east or west; Twenty-fourth street, east or west; Sixteenth street, east or west; Fourteenth street, east or west; Tenth street, north; Ninth street, north or south; Eighth street, north; Sixth street, north or south; Fifth street, north or south; Fourth street, north or south; Third street, north or south; Second street, north.

Outbound to Second street, north or south; Third street, north or south; Fourth street, north or south; Fifth street, north or south; Sixth street, north or south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south: Fourteenth street, west; Sixteenth street, east or west; Twenty-fourth street, east; Twenty-sixth street, west; Precita avenue, east.

Glen Park Line.

Inbound to San Jose avenue, south; Bosworth street, west; Twenty-ninth street, east or west; Twenty-second street, east or west; Eighteenth street, west; Sixteenth street, east or west; Valencia street, north; Fourteenth street, east; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth street, north or south; Fifth street, south; Fourth street, north or south; Third street, north or south; Mission street, east; Market street, east; Montgomery street, north.

Outbound to Third Street, north or south; Fourth street, north

or south; Fifth street, south; Sixth street, south; Eighth street, south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, east; Mission street, south; Valencia street, south, Sixteenth street, east or west; Eighteenth street, west; Twenty-second street, west; Twenty-ninth street, west; San Jose avenue, south.

Guerrero Street Line.

Inbound to Ocean avenue, east or west; Bosworth street, west; Twenty-ninth street, east or west; Twenty-second street, east or west; Eighteenth street, west; Sixteenth street, east or west; Valencia street, north; Fourteenth street, east; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth street, north or south; Fifth street, south; Fourth street, north or south; Third street, north or south; Second street, north.

Outbound to Second street, north; Third street, south; Third street, north (not good on Ferry cars); Fourth street, north or south; Fifth street, south; Sixth street, north or south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, east; Mission street, south; Valencia street, south; Sixteenth street, east or west; Eighteenth street, west; Twenty-second street, west; Twenty-ninth street, west; Bosworth street, west; Ocean avenue, west.

Haight Street Line.

Inbound to Masonic avenue, north or south; Fillmore street, north or south; Market street, west; Valencia street, south; Tenth street, south; Polk street, north; Ninth street, south; Larkin street, north; Eighth street, south; Sixth street, south; Taylor street, north; Fifth street, south; Powell street, north; Fourth street, south; Third street, south; Kearny street, north; Montgomery street, north; Second street, south; Sansome street, north.

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Outbound to Sutter street, west; Sansome street, north; Second street, south; Montgomery street, north; Post street, west; Third street, south; Kearny street, north (not good on Ferry cars); Ellis street, west; Fourth street, south; Fifth street, south; Powell street, north; Sixth street south; Eighth street, south; Ninth street, south; Larkin street, north; Tenth street, south; Polk street, north; Fillmore street, north or south; Masonic avenue, west, Stanyan street, south.

Hayes Street Line.

Inbound to Devisadero street, south; McAllister street, east; Turk street, east; Devisaderi street, north, at Ellis street; Fillmore street, north or south; Larkin street, north or south; Leavenworth street, north or south; Taylor street, north or south; Powell street, north; Market street, east; Market street, west to Valencia street or Castro street lines; Fourth street, south.

Outbound to Powell street, north; Taylor street, south; Leavenworth street, north or south; Larkin street, north or south; Fillmore

street, north or south; Devisadero street, north, at O'Farrell street; McAllister street, west; Devisadero street, south, at Hayes street; Sixth avenue or Eighth avenue, north (good only for cash passengers west of Devisadero street).

Howard Street Line.

Inbound to Bryant street, north or south; Folsom street, north or south; Howard street, south; Twenty-second street, west; Mission street, south; Sixteenth street, east or west; Fourteenth street, east or west; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth street, north or south; Fifth street, north or south; Fourth street, north or south; Third street, north or south; Second street, north.

Outbound to Second street, south; Third street, south, Third street, north (not good on Ferry cars); Fourth street, north or south; Fifth street, south; Sixth street, north or south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, west; Sixteenth street, east or west; Mission street, south; Howard street, south; Folsom street, south; Bryant street, south.

Ingleside Line.

Inbound to San Jose avenue, north or south; Mission street, south; Bosworth street, west; Twenty-ninth street, west; Valencia street, north; Twenty-sixth street, east; Twenty-second street, east or west; Sixteenth street, east or west; Fourteenth street, east; Fourteenth street, west to Eighteenth street line; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth
330 street, north or south; Fifth street, north or south; Fourth street, north or south; Third street, north or south; Second street, north.

Outbound to Second street, south; Third street, south; Third street, north (not good on Ferry cars); Fourth street, north or south; Fifth street, south; Sixth street, north or south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, west; Sixteenth street, east or west; Twenty-second street, east or west; Twenty-ninth street, west; Bosworth street, west; Mission street, south; San Jose avenue, south.

Jackson Street Line.

Inbound to Fillmore street, north or south; Polk street, north or south; Powell street, north; Clay street, east; Sutter street, east; Post street, east or west; Ellis street, east or west; Market street, east or west; Fifth street, south. To Ferry—Kearny street, north or south; Montgomery street, north or south; Sansome street, north or south.

Outbound to Post street, east or west; Sutter street, east or west; Sacramento street, west; Clay street, east; Polk street, north or south; Fillmore street, north or south; Jackson street, west. From Ferry—

Sansome street, north or south; Montgomery street, north or south; Kearny street, south; Kearny street, north (not good on Ferry cars).

Kentucky Street Line.

Northbound to Eighteenth street, west; Townsend street, west; Brannan street, east or west; Bryant street, east or west; Harrison street, west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Third street, north; Kearny street, north.

Southbound to Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, west; Bryant street, east or west; Brannan street, east; Eighteenth street, west; Kentucky street, south.

Market Street Line.

Inbound to Church street, north or south; Valencia street, south; Haight street, west; Tenth street, south; Polk street, north; Ninth street, south; Larkin street, north; Hayes street, west; Eighth street, south; McAllister street, west; Sixth street, south; Taylor street, north; Eddy street, west; Fifth street, south (to Mail Dock only); Powell street, north; Ellis street, west; Fourth street, south; Third street, south; Kearny street, north; Montgomery street, north; Second street, south; Sansome street, north; Sutter street, west.

Outbound to Sutter street, west; Second street, south; Montgomery street, north; Post street, west; Third street, south; Kearny street, north (not good on Ferry cars); Ellis street, west; Fourth street, south; Powell street, north; Fifth street, south; Sixth street, south; Eighth street, south; Ninth street, south; Larkin street, north; Tenth street, south; Polk street, north; Church street, north or south; Eighteenth street, west; Castro street, south.

331 Masonic Avenue Line.

Inbound to Frederick street, west at Stanyan street; Clayton street, north; Ashbury street, south; Haight street, east; Devisadero street, north; Fillmore street, south, at Page street; Fillmore street, north, at Hayes street; Polk street, north or south; Larkin street, north; Ninth street, south; Market street, west to Valencia street or Castro street; Eighth street, south; Taylor street, north; Sixth street, south; Fifth street, south; Powell street, north; Fourth street, south; Third street, south; Kearny street, north; Montgomery street, north.

Outbound to Sutter street, west; Second street, south; Post street, west; Montgomery street, north; Kearny street, north (not good on Ferry cars); Third street, south; Fourth street, south; Ellis street, west; Powell street, north; Fifth street, south; Sixth street, south; Eighth street, south; Ninth street, south; Larkin street, north; Polk street, north or south; Fillmore street, north, at Hayes street; Fillmore street, south, at Oak street; Oak street, west, at Masonic avenue; Haight street, west; Ashbury street, south; Clayton street, north; Frederick street, west, at Stanyan street.

Mail Dock Line.

Eastbound to Mission street, east or west; Howard street, east or west; Folsom street, east or west; Bryant street, east or west; Fourth street, south; Third street, south.

Westbound to Third street, north or south; Fourth street, north or south; Bryant street, west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Powell street, north; Eddy street, west.

McAllister Street Line.

Inbound to Devisadero street, north; Devisadero street, south (not good on Hayes street cars); Fillmore street, north or south; Larkin street, north or south; Leavenworth street, north; City Hall avenue, west; Market street, west (to Valencia street or Castro street lines); Sixth street, south; Taylor street, north; Fifth street, south; Powell street, north (good on North Beach cars only); Fourth street, south; Third street, south; Kearny street, north; Montgomery street, north; Sansome street, north; Battery street, north.

Outbound to Battery street, north; Montgomery street, north; Second street, south; Sutter street, west; Post street, west; Third street, south; Kearny street, north (not good on Ferry cars); Fourth street, south; Ellis street, west; Powell street, north; Fifth street, south; Sixth street, south; City Hall avenue, west; Larkin street, north or south; Fillmore street, north or south; Devisadero street, south; Devisadero street, north, good on Richmond cars only); Fulton street, west; Sixth avenue or Eighth avenue, north (good only for cash passengers boarding car west of Devisadero street).

Mission and Chutes Line.

Southbound to Clement street, east or west; California street, east or west; Devisadero street, north; Sacramento street, east; Sutter street, east; Ellis street, east; Turk street, east; McAllister street, east or west; Hayes street, west (good only for cash passengers boarding car east of Presidio avenue); Oak street, west; Haight street, east or west; Market street, east or west; Guerrero street, north or south; Valencia street, north or south; Sixteenth street, east; Mission
332 street, north; Twenty-second street, east or west; Mission street, west, at Twenty-ninth street, east or west; Mission street, west, at Twenty-ninth street; Twenty-ninth street, west.

Northbound to Twenty-sixth street, east; Twenty-second street, east or west; Sixteenth street, east; Mission street, north; Valencia street, north; Guerrero street, north; Market street, east or west; Haight street, east or west; Fillmore street, north; Oak street, west; Hayes street, west; McAllister street, east or west; Turk street, east; Ellis street, east; Sutter street, east or west; Sacramento street, east; Devisadero street, north; California street, west; Clement street,

west; Fulton street, east (good only for cash passengers boarding car west of Devisadero street).

Mission and Polk Streets Line.

Northbound to Bosworth street, west; Twenty-ninth street, west; Valencia street, north; Twenty-sixth street, east; Twenty-second street, west; Eighteenth street, east or west; Fourteenth street, east; Fourteenth street, west (to Eighteenth Street line); Tenth street, north; Mission street, east; Market street, east; Market street, west (to Haight street line); Hayes street, west; McAllister street, east or west; Turk street, east; Eddy street, west; Ellis street, east; O'Farrell street, west; Sutter street, east or west; Sacramento street, east or west; Washington street, east; Jackson street, west; Pacific avenue, west.

Southbound to Pacific avenue, west; Jackson street, west; Washington street, east; Sacramento street, east or west; Sutter street, east or west; O'Farrell street, west; Ellis street, east; Eddy street, west; Turk street, east; McAllister street, east or west; Hayes street, west; Market street, east or west; Mission street, east; Tenth street, south; Fourteenth street, west or east; Sixteenth street, east or west; Twenty-second street, east or west; Twenty-ninth street, west; Bosworth street, west; Mission street, south; Onondaga avenue, west.

Mission and Twenty-fourth Streets Line.

Inbound to Castro street, north or south; Guerrero street, north or south; Valencia street, north or south; Mission street, north or south; Twenty-second street, east, at Mission street; Sixteenth street, east or west; Fourteenth street, east; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth street, north or south; Fifth street north or south; Fourth street, north or south; Third street, north or south; Second street, north.

Outbound to Second street, south; Third street, south; Third street, north (not good on Ferry cars); Fourth street, north or south; Fifth street, south; Sixth street, north or south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, west; Sixteenth street, east or west; Twenty-second street, east; Mission street, south; Valencia street, south; Guerrero street, south; Castro street, south; Castro street, north (good only for cash passengers boarding car west of Mission street).

333 Ninth and Polk Streets Line.

Northbound to Bryant street, east or west; Harrison street, east or west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Hayes street, west; McAllister street, east or west; Turk street, east; Eddy street, west; Ellis street, east; O'Farrell street, west; Sutter street, east or west; Sacramento street, east or west; Washington street, east; Jackson street, west; Pacific avenue, west.

Southbound to Pacific avenue, west; Jackson street, west; Washington street, east; Sacramento street, east or west; Sutter street, east or west; O'Farrell street, west; Ellis street, east; Eddy street, west; Turk street, east; McAllister street, east or west; Hayes street, west; Market street, east or west; Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, east or west; Bryant street, east or west.

Powell Street Line.

Northbound to Post street, east or west; Sutter street, east or west; Sacramento street, west; Clay street, east.

Southbound to Jackson street, west; Washington street, east; Clay street, east; Sacramento street, west; Sutter street, east or west; Post street, east or west; Ellis street, east or west; Eddy street, west; Market street, east or west; Fifth street, south.

Railroad Avenue Line.

Inbound to Railroad avenue, north, at Sixteenth avenue.

Sacramento Street Line.

Inbound to Polk street, north or south; Powell street, south; Powell street, north (not good on Jackson street cars); Kearny street, north or south; Montgomery street, north or south; Sansome street, north or south.

Outbound to Sansome street, north or south; Montgomery street, north or south; Kearny street, south; Kearny street, north (not good on Ferry cars); Powell street, north or south; Polk street, north or south; Fillmore street, north or south; Sacramento street, west.

San Bruno Avenue Line.

Inbound to Folsom street, north; Twenty-sixth street, east, at Folsom street; Twenty-sixth street, west, at Howard street; Twenty-fourth street, east; Twenty-second street, west, at Mission street; Mission street, east or west.

Outbound to Howard street, north; Twenty-fourth street, east; Twenty-sixth street, west, at Howard street; Kentucky street, south.

San Mateo Suburban Line.

Inbound to San Jose avenue, north; Onondaga avenue, west; Bosworth street, west; Twenty-ninth street, west; Valencia street, north; Twenty-sixth street, east; Twenty-second street, east or west; Sixteenth street, east or west; Fourteenth street, east; Tenth street, north; Ninth street, north or south; Eighth street, north or south; Sixth street, north or south; Mission street, east, or Fifth
334 street, south; Market street, east; Eddy street, west; Powell street, north.

Outbound to Fifth street, south; Sixth street, north or south; Eighth street, north or south; Ninth street, north or south; Tenth street, north or south; Fourteenth street, west; Sixteenth street, east or west; Twenty-second street, east or west; Twenty-ninth street, west; Bosworth street, west; Onondaga avenue, west.

Sixth and Sansome Streets Line.

Northbound to Bryant street, east or west; Harrison street, west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west, at Sixth street; Eddy street, west; Ellis street, east or west; Post street, west; Kearny street, south; Sutter street, east; Kearny street, north; Montgomery street, north; California street, east; Broadway, east.

Southbound to Broadway, east or west; California street, east; Kearny street, north (to North Beach cars only); Sutter street, east or west; Kearny street, south; Post street, west; Ellis street, east or west; Eddy street, west; Market street, west; Mission street, west; Howard street, east or west; Folsom street, east or west; Harrison street, west; Bryant street, east or west; Brannan street, east.

Sutter Street Line.

Inbound to Sixth avenue, north or south; Devisadero street, south; Fillmore street, north or south; Polk street, north or south; Powell street, north (to North Beach cars only); Kearny street, north or south; Montgomery street, north; Sansome street, north; Market street, east; Market street, west (to Valencia street and Castro street lines only); Battery street, north.

Outbound to Battery street, north; Sansome street, north; Montgomery street, north or south; Kearny street, south; Kearny street, north (not good on Ferry cars); Powell street, north or south; Polk street, north or south; Fillmore street, north or south; Devisadero street, north; Sixth avenue, south.

Sutter and Jackson Streets Line.

Inbound to Devisadero street, south; Fillmore street, north; Washington street east; Fillmore street south, at Sutter street; Sutter street, west; Polk street, north or south; Powell street, north (to North Beach cars only); Kearny street, north or south; Montgomery street, north; Sansome street, north; Market street, east; Battery street, north.

Outbound to Battery street, north; Sansome street, north; Montgomery street, north or south; Kearny street, south; Kearny street, north (not good on Ferry cars); Powell street, north or south; Polk street, north or south; Sutter street, west, at Fillmore street; Fillmore street, south, at Sutter street; Sacramento street, west; Fillmore street, north, at Jackson; Devisadero street, south.

Sutter and Sacramento Streets Line.

Inbound to Devisadero street, north or south; Fillmore street, north, at Sacramento street; Fillmore street, south, at Sutter street; Polk street, north or south; Powell street, north (to North
335 Beach cars only); Kearny street, north or south; Montgomery street, north; Sansome street, north; Market street, east; Battery street, north; Market street, west (good only on Valencia street and Castro street cars).

Outbound to Battery street, north; Sansome street, north; Montgomery street, north or south; Kearny street, south; Kearny street, north (not good on Ferry cars); Powell street, north or south; Polk street, north or south; Sutter street, west; Fillmore street, south, at Sutter street; Fillmore street, north, at Sacramento street; Devisadero street, north; Sixth avenue, south; California street, west.

Tenth and Montgomery Streets Line.

Northbound to Harrison street, east or west; Folsom street, east, or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Hayes street, east or west; Larkin street, north; McAllister street, east or west; Turk street, east; Eddy street, west; Ellis street, east or west; Powell street, North or south; Kearny street, north or south; Market street, east, at Montgomery street; Sutter street, east or west; Bush street, east; Sacramento street, east; Clay street, west; Kearny street, north.

Southbound to Clay street, east; Sacramento street, west; Sutter street east or west; Kearny street, south; Market street, east or west; Powell street, north or south; Ellis street, west; Eddy street, west; McAllister street, west; Larkin street, north or south; Hayes street, west; Market street, west; Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, east or west; Bryant street, east or west.

Third and Kearny Streets Line.

(To Ferries) Line.

Northbound to Brannan street, east or west; Bryant street, east or west; Harrison street, west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Post street, east or west; Sutter street, east or west; Bush street, east; Sacramento street, west; Clay street, east; Sansome street, north.

Southbound to Broadway, west; Sansome street, north or south; Clay street, east; Sacramento street, west; Sutter street, west; Post street, west; Market street, west; Mission street, west; Howard street, west; Folsom street, west; Harrison street, west; Bryant street, west; Brannan street, east (Mail Dock only); Third street, at Townsend street; Kentucky street, south, at Twenty-third street.

Third and Kearny Streets Line.

(To North Beach) Line.

Northbound to Brannan street, east or west; Bryant street, east or west; Harrison street, west; Folsom street, east or west; Howard street, east or west; Mission street, east or west; Market street, east or west; Post street, east or west; Sutter street, east or west; Bush street, east; Sacramento street, west; Clay street, east.

Southbound to Broadway, east; Clay street east; Sacramento street, west; Sutter street, east or west; Post street, west; Mar-
336 ket street, east or west; Mission street, east or west; Howard street, east or west; Folsom street, east or west; Harrison street, west; Bryant street, west; Brannan street, east (Mail Dock only); Third street, at Townsend street; Kentucky street, south at Twenty-third street.

Turk and Eddy Streets Line.

Inbound to Clement street, east or west; California street, east or west; Devisadero street, north; Sacramento street, east; Sutter street, east; Ellis street, east; Devisadero street, south at Turk street; Fillmore street, south; Larkin street, north or south; Leavenworth street, north or south; Taylor street, north or south; Market street, west, to Valencia street or Castro street; Fifth street, south; Powell street, north (not good on Jackson street cars); Fourth street, south; Third street, south; Kearny street, north; Second street, south; Montgomery street, north; Sansome street, north.

Outbound to Second street, south; Post street, west; Montgomery street, north; Third street, south; Kearny street north (not good on cars to Ferry); Ellis street, west; Fourth street, south; Fifth street, south; Powell street, north; Leavenworth street, south; Larkin street, north or south; Fillmore street, north or south; Devisadero street, south; Sutter street, west; Devisadero street, north; California street, west; Clement street, west; Sixth avenue, south; Fulton street, west; Fulton street, east (good when punched here for cash passengers boarding car west of Devisadero street).

Valencia Street Line.

Inbound to San Jose avenue, north or south; Mission street, south, at Twenty-ninth street; Twenty-second street, east or west; Sixteenth street, east or west; Fourteenth street, east; Market street, west; Haight street, west; Polk street, north; Larkin street, north; Hayes street, west; Eighth street, south; McAllister street, west; Sixth street, south; Taylor street, north; Fifth street, south (to Mail Dock only); Powell street, north; Eddy street, west; Ellis street, west; Fourth street, south; Third street, south; Kearny street, north; Sutter street, west; Montgomery street, north; Sansome street, north.

Outbound to Sutter street, west; Second street, south; Montgomery

street, north; Post street, west; Kearny street, north (not good on Ferry cars); Third street, south; Fourth street, south; Ellis street west; Powell street, north; Fifth street, south; Sixth street, south; Eighth street, south; Ninth street, south; Larkin street, north; Tenth street, south; Polk street, north; Fourteenth street, west; Sixteenth street, east or west; Twenty-second street, west; Mission street, south, at Twenty-ninth street; San Jose avenue, south.

Lines of Other Companies.

Passengers on lines of the United Railroads of San Francisco shall be entitled to transfers to the following lines of other companies, at the following points and in the following directions, as said
337 lines of other companies were operated on the 1st day of September, 1908, to wit:

To the Parkside Transit Company Line.

At Twentieth avenue and H street or at Ingleside (Corbett and Ocean avenues).

Parkside Transit Company's Line.

Passengers on the street railroad line as the same was operated by the Parkside Transit Company on the first day of September, 1908, shall be entitled to transfers to the following lines at the following points and in the following directions, to wit:

To the cars of the United Railroads, at Twentieth avenue and H street, or at Ingleside (Corbett and Ocean avenues).

Presidio and Ferries Railroad.

Passengers on the following street railroad lines as the same were operated by the Presidio and Ferries Railroad Company on the first day of September, 1908, shall be entitled to transfers from the following lines, at the following points and in the following directions to wit:

Union Street Line.

East and west bound to Mason street, north; Hyde street, north or south; Polk street, north or south at Vallejo street; Fillmore street, north or south.

California Street Cable Railroad.

Passengers on the following street railroad lines as the same were operated by the California Street Cable Railroad Company on the first day of September, 1908, shall be entitled to transfers from the following lines, at the following points and in the following directions, to wit:

California Street Line.

East- and westbound to Hyde street, north or south.
Westbound to Park and Cliff House cars, west, at Presidio avenue; Sacramento street line, west, at Presidio avenue.

Hyde Street Line.

North- and southbound to California street, east or west; Union street, east or west; Jones Street Short Line, south, at O'Farrell street.

Jones Street Short Line to

Jones street, north, at O'Farrell street; O'Farrell street, east.

Regulating Transfers.

In every instance the transfer given to a passenger may designate the point or place of transfer, and the same must be used at such point or place, within a reasonable time, not exceeding fifteen (15) minutes after such point or place is reached by the car from which the passenger is transferred, provided, that within said fifteen (15) minutes a car shall pass such point or place of transfer in the direction and upon the route indicated by said transfer; but if no car shall pass such point within said time the passenger shall have the right to take the first available car passing such point in the direction indicated upon the passenger's transfer. A passenger upon any car delayed through the fault, negligence or inability of any person, company or corporation operating the same shall be entitled
338 to receive a transfer to a car upon the nearest line of such person, company, or corporation going in the same general direction as the car delayed.

Section 14. There shall be posted in a conspicuous place in each car a printed notice, containing information as to transfer points along the line upon which the car is run, and containing rules and regulations relating to transfers and the rights and privileges of passengers thereunder. A copy of such notice and rules and regulations shall, by every person, firm or corporation operating street car lines in said City and County, for the transportation of passengers, be filed with the Clerk of the Board of Supervisors within ten (10) days after the passage of this Ordinance.

Section 15. All persons, firms and corporations engaged in the business of operating street cars in said City and County for the transportation of passengers shall, within ten (10) days from the date of the passage of this Ordinance, file with the Clerk of the Board of Supervisors a sheet containing the time schedule in force on each of their respective lines, which said time schedule shall show the number of cars in daily operation on each line and the headway on which the cars on each of said lines are run. Said time schedule

shall be certified to be correct by the superintendent of each line operating such street railroad cars. Whenever such time schedule shall be changed, the schedule so changed, duly certified by the superintendent, shall be filed with the Clerk of the Board of Supervisors, within ten (10) days after such change is made.

Section 16. Whenever, in the opinion of the Board of Supervisors, the safety, comfort or convenience of the public requires a change in such time schedule, in force on any street car line, said Board shall by resolution direct such change, and such time schedule must be adopted by the persons, firms or corporations operating such line, and all cars thereon must be operated in accordance with said time schedule as so changed.

Section 17. On the first day of April, July, October and January of each year, all persons, firms and corporations engaged in the business of operating street cars in said City and County for the transportation of passengers shall file with the Clerk of the Board of Supervisors a statement, duly verified by the superintendent of each railroad, showing the number and names of all passengers and other persons killed and injured in the operation of such railroad during the quarter next preceding the last preceding quarter, and the nature and cause of all accidents during such preceding quarter, resulting in the death or injury of such persons. Such statement shall also contain the name- of the conductor and motorman, gripman or other person in charge of each car on or by which such accident was caused, and the period of employment of such employes by such person, firm or corporation.

Section 18. Passengers shall be allowed ample time to board and alight from cars.

Section 19. It shall be unlawful for any person to wilfully obstruct or cause to be obstructed without any right or authority the passage of any street car, or to place or cause to be placed upon the
339 rail or track of any street railroad any object or thing preventing or tending to prevent the safe and proper control, management and operation of any car.

The motorman, gripman or other person in charge of a car in motion must always, by ringing the bell or striking the gong on such car, give timely warning of the approach of such car to pedestrians, drivers of vehicles and others who may happen to be on or about to cross the track in front of such car.

Section 20. It shall be unlawful for any passenger or other person on board of any car, without any right or authority, to refuse to pay his fare, or to ring the bell on such car, interfere with the fare register, meddle with the trolley pole or rope attached thereto, or in any manner obstruct the persons in charge of such car in the performance of their usual duties.

Section 21. The provisions of this Ordinance, and of every section thereof, are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Section 22. It is hereby declared unlawful to violate the provisions, or any provision, of this Ordinance, and any person, firm

or corporation, or the agent, servant or employe of any such person, firm or corporation violating the provisions, or any provision, of this Ordinance, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than ten (10) dollars nor more than one hundred (100) dollars, or by imprisonment in the County Jail for a period of not more than three (3) months, or by both such fine and imprisonment.

Section 23. This Ordinance, except as hereinabove otherwise provided, shall go into effect from and after the date of its passage."

Counsel for the Complainant thereupon offered and there was received in evidence Ordinance No. 1109 N. S. of the City and County of San Francisco, State of California, approved March 16, 1909, requiring cars operated over street railway tracks to be equipped with fenders described in said ordinance and regulating the operation of cars on street railway tracks in the City and County of San Francisco. Said ordinance reads as follows:

"Be it ordained by the people of the city and county of San Francisco as follows:

Section 1. That from and after April 30, 1910, it shall be unlawful for any person, firm or corporation to run or operate, or cause to be run or operated, any car upon or over any street railway track in the City and County of San Francisco, without such car being equipped with a fender as herein provided.

Said fender shall be placed upon and attached to the front end of each such car and not attached to the frame of the wheels
340 or truck thereof; and shall be so placed and maintained that the space between the bottom of the front part of the fender and the roadbed or rails shall not exceed three (3) inches. Each such fender shall extend across the front end of such car and shall be of a width of not less than sixty-eight (68) inches. The front edge of the fender shall extend ahead of and beyond the front of the car and the farthest projection thereof. Such fender shall be of such height that it shall extend upwards from the rails or roadbed to at least the floor level of the car. Such fender shall form a scoop not less than three (3) feet from front to back, which upon striking a person, will tilt back and thereby form a cradle or receptacle capable of receiving and securely retaining such person; and its upper portion shall form a shield extending across the entire front of the car to protect persons falling into or upon it from injuries from contact with the rigid projecting portions of the car, such as the bumpers, bumper-beams or drawbars, and such fender shall be constructed of material that will afford ample strength for the purpose for which it is intended, and of yielding or a resilient character so as to cushion or break the impact of a person falling into or struck by it. It shall be protected along the front edge by substantial buffers of rubber or similar yielding or elastic material. No fender attached to a car need be lowered so as to be 'in use' upon a street the grade of which exceeds ten (10) per cent.

Section 2. Any person, firm or corporation violating any provision of this Ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined, for each and every offense, not less than one hundred (100) dollars, nor more than three hundred (300) dollars, or by imprisonment for a term not exceeding six (6) months in the County Jail of the City of San Francisco, or by both such fine and imprisonment."

It was thereupon stipulated and agreed between counsel for the respective parties that during rush hours on Market Street westerly from the Embarcadero there is heavy travel for automobiles and cars to Gough and Market Streets. Other vehicular travel such as delivery, draying, expressing and the like is not heavy, due to the diversion of such traffic into other streets.

It was next stipulated and agreed by counsel for the respective parties that any increase in the number of cars around the loop at the Embarcadero would increase the congestion at that point.

341 It was next admitted by counsel for the defendants that no ordinance or resolution was ever passed or adopted by the City and County of San Francisco offering to purchase any of the existing lines of railway in said City and County of San Francisco save and except the resolution mentioned and referred to in Paragraph 34 of Defendants' Answer. It was admitted by counsel for the Complainant that Exhibit "A" annexed to the Answer of the Defendants is a true copy of said resolution.

The cause was here continued until Wednesday, August 23rd, 1916, at 10 o'clock A. M.

August 23rd, 1916, 10 o'clock A. M.

Counsel for the Complainant offered and there was received in evidence Ordinance No. 3829, N. S. of the City and County of San Francisco, State of California, approved August 4, 1916, amending Section 3 of Ordinance No. 3212 N. S. entitled "Regulating the Use of the Streets of the City and County of San Francisco by self-propelled Motor Vehicles carrying Passengers for Hire," etc. Said ordinance reads as follows:

"Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. Section 3 of Ordinance No. 3212 (New Series), the title of which is recited in the title of this Ordinance, is hereby amended so as to read as follows:

Section 3. Application for a 'jitney bus' permit shall be made in writing and filed with the Chief of Police annually on or before the 15th day of December and shall state:

(*a*) The type of motor vehicle and the name of the manufacturer or popular name thereof;

(*b*) The horsepower thereof;

(*c*) The factory number and state license number thereof;

(*d*) The seating capacity thereof according to its trade rating;

(*e*) The name of the owner or lessee and of the person to be in immediate charge thereof as operator or chauffeur and the number of his state license;

(*f*) That the operator is a citizen of the United States and has been a resident of the City and County of San Francisco for more
342 than one year; or now has a permit and has heretofore taken out his first papers.

(*g*) Whether the driver has had six months' experience in operating automobiles over the streets of the City and County of San Francisco as hereinafter provided;

(*h*) That the driver is physically qualified to drive a motor car safely and that said driver's hearing and eyesight are unimpaired.

The driver shall pass an oral examination as to knowledge of traffic laws and rules of the City and County.

(*i*) The signature of each applicant shall be acknowledged before a notary public or some other officer or magistrate duly authorized to administer oaths. At the same time and in the same manner as herein provided application shall be made to renew the chauffeur's permit by each and every operator or chauffeur of a 'jitney bus.'

Section 2. Five new sections are hereby added to said Ordinance to be numbered respectively 5*a*, 5*b*, 19*a*, 19*b*, and 19*c*, the same to read as follows:

Section 5*a*. No more than 700 permits to operate 'jitney busses' on Market street between Sixth and Fremont shall be granted; priority of application shall be observed in filling vacancies. No 'jitney bus' shall have more than one operator or driver.

Section 5*b*. Before the issuance of the permit the driver or operator to whom it has been granted, shall furnish to the Police Department two photographs of himself, one of which shall be for the License Bureau and one for the Traffic Bureau; he shall also carry a like photograph upon his operator's card.

Section 19*a*. All 'jitney busses' shall carry signs on which shall be displayed the route to be traversed and termination thereof, and all busses shall run to the termination so stated.

Section 19*b*. No jitney busses shall be operated on Market street between Fremont street and Sixth street betwen the hours of 10:30 o'clock a. m. and 4 o'clock p. m.; Sundays and holidays excepted.

Section 19*c*. The Police Department shall have and exercise the following powers in connection with the enforcement of this Ordinance:

To establish traffic lanes at crossings where traffic is congested and to direct pedestrians not to cross streets except along such lanes and at intervals to halt vehicular traffic along the street so as to permit pedestrians to cross in safety.

To establish points where jitney busses may take on and discharge passengers, but there shall be not more nor less than two such points on each side of the street in every block on Market street between the Embarcadero and Seventh street.

Whenever deemed advisable for the public safety or convenience, to temporarily suspend vehicular traffic upon any street or to divert

the traffic thereon, or to divert and direct the course of pedestrian traffic."

343 Each and all of the foregoing ordinances were received in evidence over the objections of the Respondents that each and all of them were incompetent, irrelevant and immaterial and not responsive to any issue in the case.

WM. VON PHUL, a witness for the Complainant, having been duly sworn, testified as follows:

"I am Vice-president and General Manager of the Complainant, United Railroads of San Francisco, and have been such since June 1st, 1916. I had previously had street railroad experience. Beginning with about 1901 I was General Superintendent of the New Orleans and Carrolton Light & Power Company for two years. I was in San Francisco after the fire of 1906 from the latter part of April until the latter part of December. During that time I became acquainted with the physical properties of the United Railroads of San Francisco. I was engaged at that time with the firm of Ford, Bacon & Davis in the reconstruction of the properties. I was not at that time a member of the firm, but am now. The business of the firm is general engineering, particularly in the public utility field,—the construction and operation of street railroads and electric light properties. I am a mechanical engineer, a member of the American Society of Mechanical Engineers and a member of the American Society of Civil Engineers, and have been continuously engaged in the engineering business since 1893, both in the operating and engineering side of public utility properties, dealing practically entirely with public utilities. Since 1905 I have dealt almost entirely with street railroads. Prior to that time I dealt in different branches of public utilities. Since I became Vice-president and General Manager of the United Railroads on June 1st of this year I have made as detailed a study as time and other duties would permit in the operation of the cars, the general conditions of traffic, and particularly the service rendered, and all general conditions of the property of the United Railroads. During that time I have made a study of the conditions existing on Market Street. That was one of the first points I took up."

It was here stipulated by counsel for the defendants that the witness was a qualified engineer and capable of testifying to
344 matters strictly within the purview of his professional qualifications.

The witness, continuing:

"I consider that the traffic conditions on Market Street are very much congested, particularly from the lower end of Market Street, say from Sutter Street down, where at present four tracks occupy the street. The headway of the cars is exceedingly close, and it is almost impossible to operate under present conditions on schedule time. In addition to that, Market Street is the main street in this

city, and there is a very large vehicular traffic on each side of the tracks through the streets.

The Court: I would like to ask you what is the usual distance from center to center of the tracks in large cities, taking New York for instance?

A. They are 9′ 6″, if I recall centers. Here 11′ 1½″ is the standard of the United Railroads, but the cars are 9′ 2″ over all. The cars in Chicago I think are 8′ 3″ or less over all. It is a question of physical construction of the instruments used.

(By the Court:)

Q. You said 'very much congested.' I want to get at your view of congestion with relation to traffic conditions in other very large cities where the streets are very much narrower than Market Street. It occurs to me at once that Broadway Street in New York is not as wide as Market Street, and the cars follow one another with great frequency there and are very much closer together. A man could not stand between two cars there.

A. Yes, he could stand between two cars.

Q. He cannot in New York.

A. I think he can on the center track between cars. The tracks are, I think, 9′ 6″, as I recall it.

(The witness, continuing:) Whether safety stations are regarded rather as a danger than a safety point is a matter largely of the difference existing in the individual opinion at the time, depending upon the traffic conditions. They are not being used universally. From what I have seen of conditions that exist here I would favor the safety stations. If there were no safety stations existing there would be no place for people to stand while waiting to board cars or after getting off cars where they would be safe from other vehicular travel unless the safety station was practically carried out from the sidewalk, protected by traffic signals. With reference to traffic other than street car traffic such as automobiles and the like, I think the automobile traffic on Market Street is heavier. I have had occasion in connection with the operation of automobiles to actually count the number of jitneys that are operating on
345 the streets. I have the data that I gathered on the subject. On April 6th, 1916, there were 17,569 jitney automobiles passing on Market Street in both directions—that is, both in and out during the course of the day. That does not mean that many separate machines. The number represents the actual number of machines that passed a given point during the day.

I have had checks made as to the number of passengers boarding and riding upon Market Street cars during the course of the day. The document which I have is a tabulation of the result of the checks that have been made under my direction. It is correct in all particulars so far as I am able to make it accurate. It was made yesterday, August 22nd, between five o'clock in the morning and 1:30 A. M. the next morning, and covers the full day with the exception of the owl cars."

The document was here offered and received in evidence and reads as follows:

"Memorandum 'On and Off' Traffic Check, Market St.

August 22nd, 1916.

Market St. Line.

Inbound:

No. Cars Entering Market at Castro	274
No. Passengers on Cars Entering Market	4,848
No. Passengers Boarding Cars on Market	5,645
No. Passengers Leaving Cars on Market	10,493

Outbound:

No. Cars Leaving Ferry	274
No. Passengers Boarding Cars on Market	11,534
No. Passengers on Cars as Pull-off Market	5,366
No. Passengers Leaving Cars on Market	6,168

Valencia Line.

Inbound:

No. Cars Entering Market at Valencia	295
No. Passengers on Cars Entering Market	8,836
No. Passengers Boarding Cars on Market	3,189
No. Passengers Leaving Cars on Market	12,025

Outbound:

No. Cars Leaving Ferry	295
No. Passengers Boarding Cars on Market	12,441
No. Passengers on Cars as Pull-off Market	9,145
No. Passengers Leaving Cars on Market	3,296

346 Haight St. Lines.

Inbound:

No. Cars Entering Market at Haight	458
No. Passengers on Cars Entering Market	15,196
No. Passengers Boarding Cars on Market	4,247
No. Passengers Leaving Cars on Market	19,443

Outbound:

No. Cars Leaving Ferry	458
No. Passengers Boarding Cars on Market	19,747
No. Passengers on Cars as Pull-off Market	15,704
No. Passengers Leaving Cars on Market	4,043

Hayes St. Lines.

Inbound:

No. Cars Entering Market at Hayes	264
No. Passengers on Cars Entering Market	4,715
No. Passengers Boarding Cars on Market	1,612
No. Passengers Leaving Cars on Market	6,364

Outbound:

No. Cars Leaving Ferry	264
No. Passengers Boarding Cars on Market	6,622
No. Passengers on Cars as Pull-off Market	5,068
No. Passengers Leaving Cars on Market	1,554

McAllister Line.

Inbound:

No. Cars Entering Market at McAllister	305
No. Passengers on Cars Entering Market	7,521
No. Passengers Boarding Cars on Market	1,838
No. Passengers Leaving Cars on Market	9,359

Outbound:

No. Cars Leaving Ferry	305
No. Passengers Boarding Cars on Market	8,967
No. Passengers on Cars as Pull-off Market	7,837
No. Passengers Leaving Cars on Market	1,130

Turk & Eddy Line.

Inbound:

No. Cars Entering Market at Eddy	221
No. Passengers on Cars Entering Market	2,665
No. Passengers Boarding Cars on Market	589
No. Passengers Leaving Cars on Market	3,254

Outbound:

No. Cars Leaving Ferry (191) Market (30)	221
No. Passengers Boarding Cars on Market	4,201
No. Passengers on Cars as Pull-off Market	2,222
No. Passengers Leaving Cars on Market	1,979

347 Sutter St. Lines.

Inbound:

No. Cars Entering Market at Sutter	501
No. Passengers on Cars Entering Market	5,109
No. Passengers Boarding Cars on Market	179
No. Passengers Leaving Cars on Market	5,288

Outbound:

No. Cars Leaving Ferry	501
No. Passengers Boarding Cars on Market	5,754
No. Passengers on Cars as Pull-off Market	5,556
No. Passengers Leaving Cars on Market	198

Summary of All Lines.

Inbound:

No. Cars Entering Market	2,318
No. Passengers on Cars Entering Market	48,927
No. Passengers Boarding Cars on Market	17,299
No. Passengers Leaving Cars on Market	66,226

Outbound:

No. Cars Leaving Ferry	2,318
No. Passengers Boarding Cars on Market	69,266
No. Passengers on Cars as Pull-off Market	50,898
No. Passengers Leaving Cars on Market	18,368"

348 (Witness, continuing:)

"The vehicular travel on Market Street other than street cars at places where there are safety stations, passes between the safety station and the curb. Under present conditions it is not allowed to pass in the space between the tracks reserved for cars. Between Kearny Street and the Ferry, where there are four tracks, vehicular travel passes between the curbs and the track,—very seldom on the tracks. The car traffic between these points is heavier than at other points on Market Street. The vehicular travel is not as heavy for the reason that very frequently at heavy times it is turned from Market Street. At points on Market Street where there are safety stations I have observed that vehicular travel, where the officer holds it up, blocks the street entirely, extending quite a way back from the point where it is held up by the traffic conditions. With relation to standing automobiles and teams at the curb all along Market Street I have observed machines standing next the curb, and a double line of machines passing sometimes four abreast, that is including the standing machines.

I am familiar with the junction of Kearny, Geary and Market Streets. I think it is a very busy center on Market Street. I have observed that cars coming outbound on Market Street on the center track have been blocked so that they extend from Kearny Street to the east of Montgomery Street. I have not noticed any particular banking up between those points of the cars on the outer track used by the city, that is, the cars that turn into Geary. If the tracks proposed to be constructed by the defendants outside of and parallel to the tracks of the complainant were constructed it would increase the banking up of cars on the outer tracks east of Kearny Street very much so far as the cars that would run on Market Street on that

outer track are concerned, and they would extend so as to block the turn-off into Geary Street, and you would have the same condition existing on the outer track then as now exists on the inner track at that point. You would have two lines of cars abreast of each other.

I have noticed several cases at different points on Market Street where there are traffic officers stationed and where there have been delays from one cause or another, accident or otherwise, the cars banked up one behind the other. Since I have been investigating the delays on Market Street I have seen the cars banked practically from Steuart Street up to the Palace Hotel (between New Montgomery and Third Street-). That would be due to an interruption across the track blocking the traffic. The banking up would be on both of the inbound tracks, but of course would be more noticeable on the inner track than on the outer track because of the greater number of cars on the inner track. I have noticed, but of course not to the same extent, the banking up at different places where there are traffic officers stationed when the Market Street traffic has to halt while the other traffic crosses. When I have noticed the bank-
349 ing up of cars where there are four tracks and two lines of cars abreast of each other, passengers alighting from the car on the center track at times have to get off between that car and the car on the outer track. With respect to passengers getting on the cars on the center tracks the same conditions prevail, that is, they have to pass, if a car is on the outer track, between the cars to get around and enter the cars on the inner track. I have seen persons attempt to get on cars on the inner track and get out of the cars on the inner track under such conditions. Very many are nervous and afraid of the dangerous condition existing in such a situation. There is always danger in a condition of that kind, liability to accidents requiring great care both in the operation of the cars, and on the part of the person trying to board or leave the cars. It is also dangerous for persons to attempt to get on or off a standing car on the inner track where there are moving cars on the outer track. At different times I have observed people attempting to avoid moving cars in trying to get on and off United Railroad cars on the center tracks. I have observed that particularly just below Montgomery Street. There is a safety station at Montgomery Street. I have noticed passengers endeavoring to get from the safety station across the tracks and into the cars on the center tracks, particularly when the car on the outer track was moving. They would start, stop, come back, wait, and sometimes miss the car on the inner track. With cars on the outer track persons would have to go around the car on the outer track in order to get to the car on the inner track.

The condition I have just described at Montgomery Street, I think is a general one wherever there are four tracks. It is my observation that all points on Market Street where there are four tracks, people endeavoring to get on or off the United Railroad cars are in difficulty and are in danger from the cars operating on the outer track. I think that condition would affect the business of the United Railroads at such points. I think it would have an effect both on the cost of operation of the road, and on the earning power of the road,

assuming that the four tracks extend out Market Street. It would increase the difficulty of operation, it would require probably a slower operation and speed on Market Street, a greater number of cars to give the same headway service which is now given. All that would be necessary. The condition would operate in decreasing the revenue because the cars operated on the outer track would serve the same territories as the cars on the inner track, and the people that were bound for those territories would take the outer cars probably in preference to the inner ones, due to the danger of crossing over the outer tracks.

I am familiar with the various crossings from the foot of Market Street clear out to Fifteenth and Castro Streets. If the proposed municipal line should be constructed outside of the center tracks and across all of these various tracks intersecting and crossing
350 Market Street, I think that the same condition would exist at the various crossing points as now exists at Market and 3rd Street-. The difficulty of operating the Complainant's cars would be largely increased and the cars would bank up at these crossings proportionately on account of the cars having to cross in two ways. I think such congestion would delay the operation of the Complainant's cars under the present schedule. I do not think that the cars could be operated as rapidly and as economically if the crossings were made. It would be necessary to have more cars if the speed was decreased in order to maintain the same headway as now. Additional cars would involve additional expense and involve other difficulties in the operation on Market Street. It would mean that the cars would be that much more numerous on Market Street, causing greater congestion at these different points. If two additional tracks should be constructed by the defendants, the same conditions would prevail on Market Street southwesterly from Geary Street as now prevail on Market Street between Geary and the Ferry. Of course, they would grow less as you went out Market Street, due to the fact that cars are leaving Market Street as you go westerly. Where the traffic is thickest and the congestion is greater and the city is busier the difficulties would be greater.

Beyond Larkin Street, where the speed limit is increased from 10 to 12 miles an hour under the ordinance, cars are accustomed to go faster. When the cars are going faster there is greater danger from moving cars to people crossing the outer tracks to get to the cars on the inner tracks. The greater the speed of the moving cars the greater the danger. The speed would be greater from Larkin Street to Castro."

Cross-examination:

"I have not noticed any particular congestion on Market Street from Larkin to 17th Street. The condition in that section is very different from the condition between Geary Street and the Ferry. A number of cars on Complainant's track turn off Market Street as they go from the Ferry. Three different lines, Numbers 1, 2 and 3, leave Market Street at Sutter, and go out Sutter. Number 4 car leaves

Market Street at Eddy and Powell and goes out Eddy. Number 5 car leaves Market Street at Jones and McAllister and goes out McAllister. Numbers 21 and 32 leave at Hayes and Larkin Streets and go out Hayes. They go to different parts of the City as they go out. One Line leaves at Haight and Gough Streets and goes out Haight Street. There is a little branching as you go to the end. The next line that leaves Market Street is the Valencia Street line on the south at Valencia, and then the Castro Street line on the end.

I have not noticed any congestion of general vehicular traffic on Market Street from Van Ness Avenue out. The congestion on Market Street between Van Ness Avenue and Third Street is very much less than that between Third and Kearny and the Ferry.

The safety station at Post Street is constructed at the intersection of Post, Montgomery and Market Streets. The safety station
351 is above Montgomery Street, nearly opposite the Palace Hotel. The intersection of the streets is right back of the safety station. Because of the gore there is a great deal more distance back of the safety station than there would be if a curb came across there. The same is true at First and Battery Streets. The same is true of the safety station at Third Street, that is the one south of the south line of Market Street. It is nearly at the intersection of Market Street. This is not true of the safety station on Market Street just west of Third. There is no room behind the Market Street station. There is another safety station on the north side of Market at the intersection of Kearny and Market; there is a fountain in back of that station. There would be more room if the fountain were not there. The safety station is at the gore like the other safety stations previously mentioned, but there are street cars coming in there off Geary Street. I would say off-hand that it would be possible to put safety stations at similar gores all the way out Market Street. I would have to examine them, but it would look so.

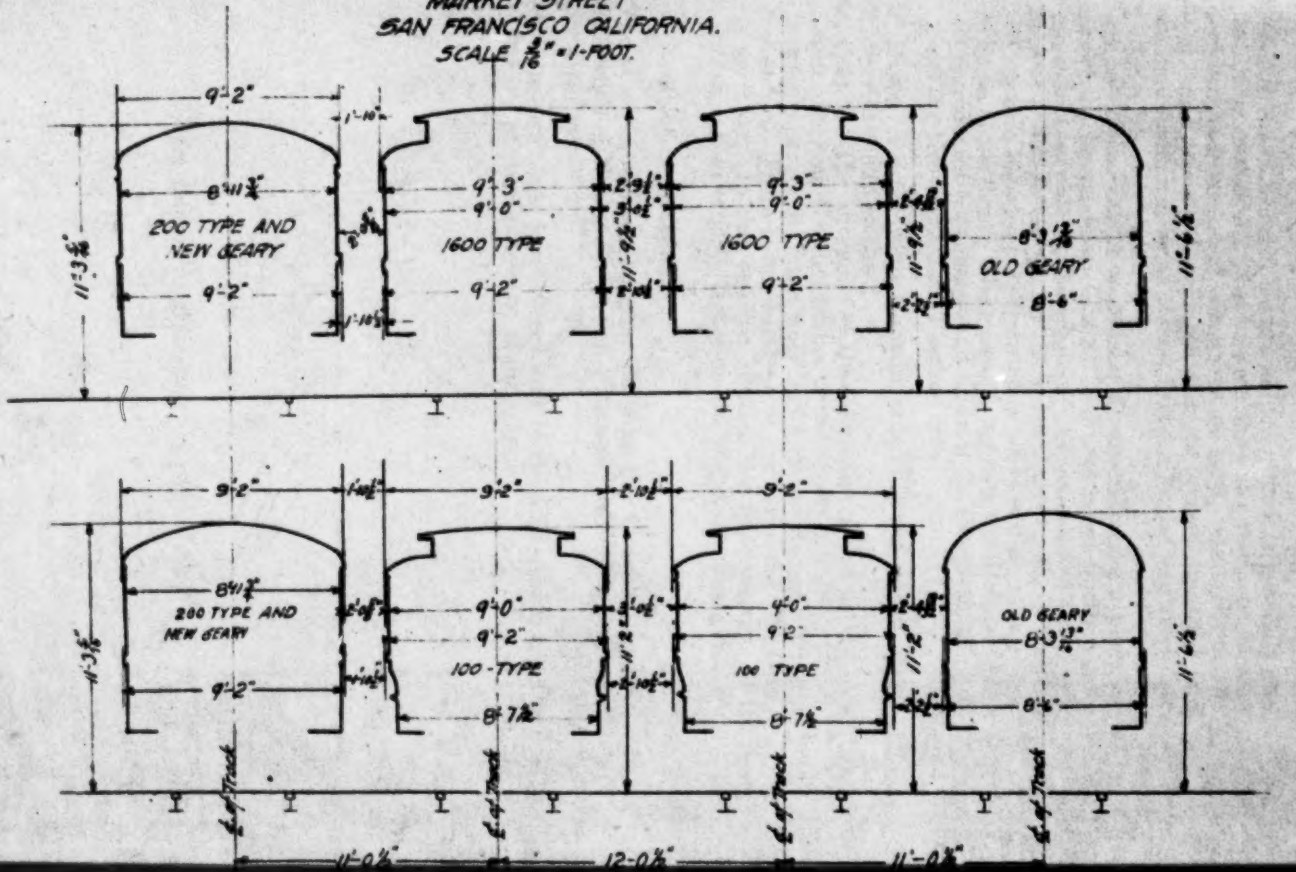
In addition to safety stations there are safety areas marked on Market Street at some points. To some extent they answer the same purposes for the protection of pedestrians as safety stations. They are not so plainly marked, but they do afford some protection.

With regard to the banking up of cars on Market Street from Kearny to below Montgomery, I noticed that condition this morning. I have not observed how often the condition exists, but I have observed it very frequently. This morning it lasted less than a minute before the cars moved ahead again. It was due to some temporary interruption of traffic at Kearny Street. The banking up of cars from the Ferry out to the Palace Hotel to which I testified was an exceptional condition. It was due to an interruption—a break-down of a wagon or something of that kind across the tracks. An interruption of that kind is the only thing that would cause the banking up of the cars of that character. I have never seen it from any other cause.

I am not familiar in detail with the condition of the street car traffic in Chicago. I do not know whether or not there are three and four tracks on the same streets in Chicago. The streets in Chicago are narrower down town than the streets of San Francisco are.

The distance between the outer tracks and the curb on streets other

DIAGRAM SHOWING CAR CLEARANCE
ON FOUR TRACK SECTION OF
MARKET STREET
SAN FRANCISCO CALIFORNIA.
SCALE $\frac{3}{16}$" = 1-FOOT.



than Market Street where there are only two lines is generally less than the distance that will exist between the outer tracks on Market Street and the curb when the four tracks are built. Generally on the streets of San Francisco there is less distance between the track and the curb than there will be on Market Street after the four tracks are built.

There are special marks on Market Street indicating a place for the cars of the Complainant to stop. I do not recall whether there are also marks on the municipal lines. Sometimes the municipal cars stop at a different place on the street than the Complainant's cars. Of my own knowledge I do not know whether there is any regulation about them. The clearance between the two cars of the
352 Complainant is 34 inches and between the Complainant's cars and the Municipal cars 22 inches.

Mr. Haven: I think you have it in your bill; what is the allegation of the Complaint on that?

Mr. Cannon: The allegation of the Complaint is just as Mr. Von Phul says. Between the cars on the center tracks it is 34½ inches, and between a car on the outer track and a car on the inner track it is 22½ inches. There is another type of car called the Old Geary that is narrower. In that case the distance is a little greater. It is 26½ inches instead of 22½ inches on the Old Geary Street car.

Redirect examination:

"The blue print called 'Diagram Showing Car Clearance on Four Track Section of Market Street, San Francisco, California, Scale 3-16 to One Foot,' is correct."

The blue print was here offered and received in evidence. The following is a photographic copy of the same.

(Here insert.)

(Here follows diagram marked page 352a.)

353 Witness:

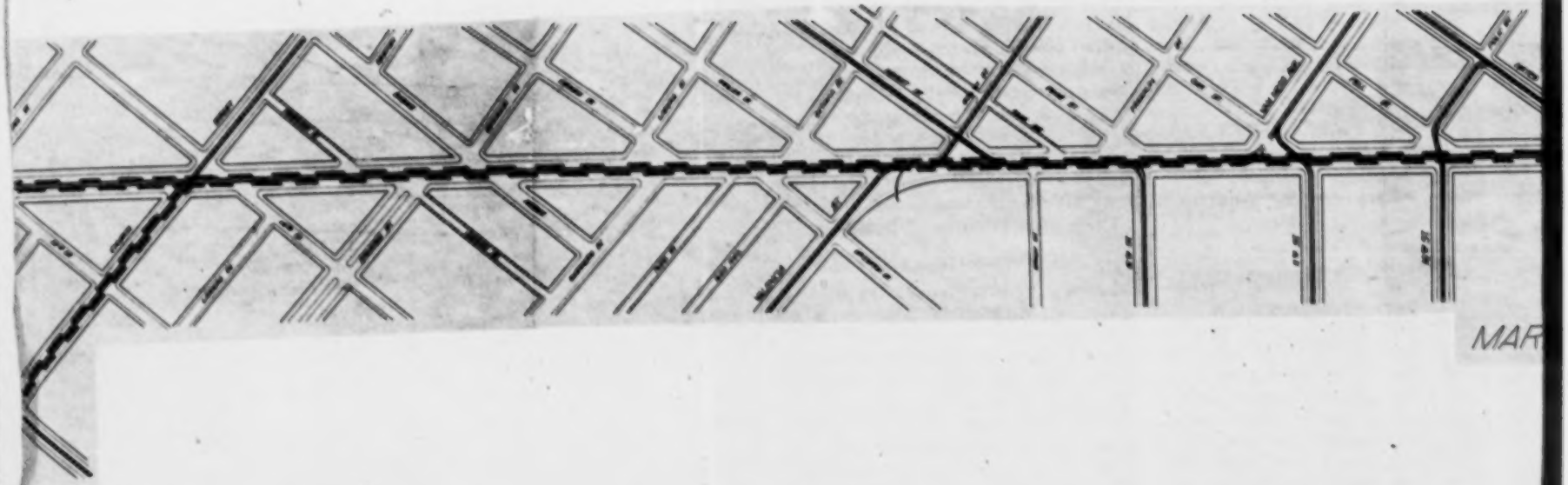
"This shows 12 feet ½ inch on the center track of Market Street, 11 feet ½ inch between the outside and the first inner track. The gauge is 4 feet 8½ inches. The standard track construction of the United Railroads is 11 feet ½ inch track centers. The width over all is 9 feet 2 inches. It is a little more on Market Street than on the others, one foot more; that is the present centers on Market Street are one foot more than the United Railroads standards for other streets. In other words the center tracks on Market Street are a foot further apart than on other streets, leaving that much more clearance beween the cars.

Behind the safety station at Kearny and Geary Streets there is a fountain called Lotta's Fountain. Under the conditions as they exist there at the present time no traffic is allowed to come easterly on Geary Street and run directly into Market Street. The traffic is diverted by the traffic officer around to the right of Lotta's Fountain and compelled to cross Market Street in that way in order to get to Market Street. That is due to the extreme congestion existing at that point at the present time and the physical condition and difficulties. If another track were put across there it would make that triangle very much smaller and to that extent would increase the already existing difficulties at that point. It would not be possible to use the safety station at that point at all with Lotta's Fountain still remaining there without blocking the traffic way entirely.

With reference to the safety station at Stockton Street it would not be possible to change the position of that safety station and put it at the intersection of Stockton and Ellis Streets without interfering with the crossing already there. On Market Street near Powell Street, that is, east of the intersection of Powell, it would not be possible to take that safety station and put it at the intersection of Eddy and Powell without interfering with the crossing already there.

It would not be possible, without interfering with the crossing, to put the safety station near Taylor Street at the intersection of Taylor and Golden Gate Avenue. Golden Gate Avenue is a very popular avenue for automobile traffic. It is free from car traffic. If the safety station were put in the intersection in any position so as not to interfere with the crossing it would probably interfere with the other traffic.

The safety station at Jones Street could not be put in the intersection of McAlister and Jones without interfering with the tracks at those points. It would not be possible to take the safety station that appears on Market Street near Third and put it at the intersection. It is now in a place where it furnishes the greatest accommodadation and safety to people. At the intersection of Gough, Haight and Market Street there is another triangle and another safety station. If another line of cars ran along there and another track were constructed, that safety station would have to be thrown further back into that triangle. That is a very busy point for cars passing
354 at that place, but not as busy as Third and Market. During the rush hours of cars on Gough Street, on Haight and on Valencia streets, that is a relatively congested point, but not as much as below. If the proposed tracks were constructed and crossed the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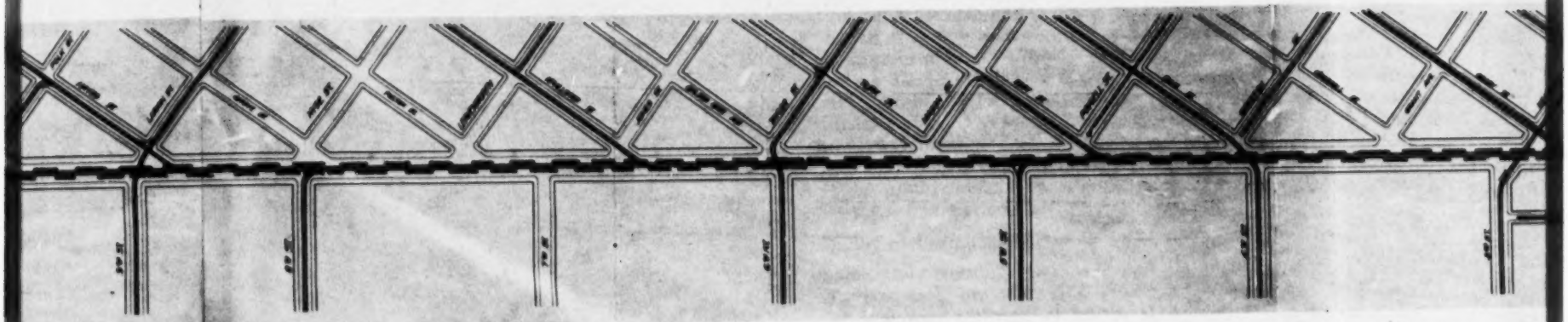
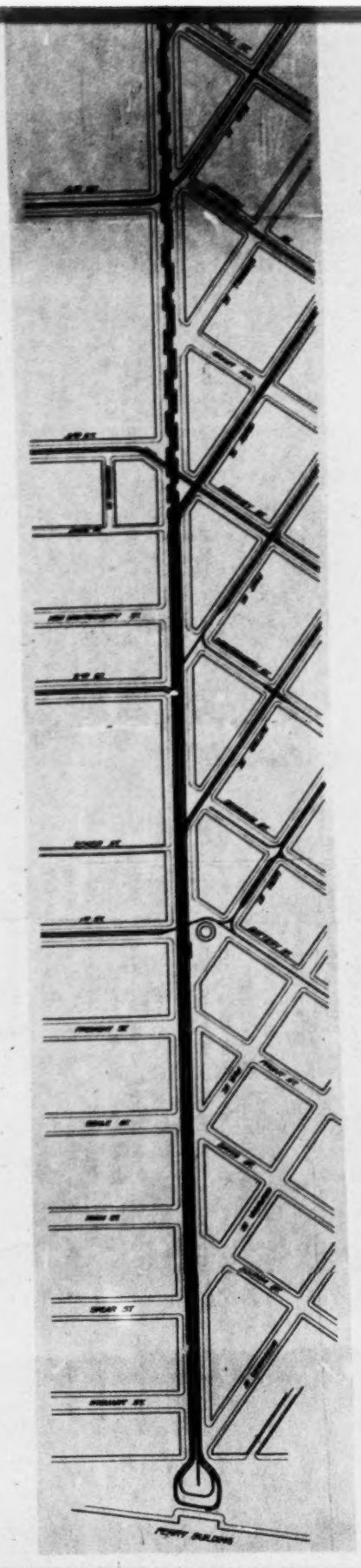


MARKET STREET · FERRY TO CASTRO STREET

Scale 240 Feet = 1 Inch


FERRY BUILDING

center tracks in order to get into Van Ness Avenue, that fact would tend to delay the progress of the cars on Market Street at that point. It would complicate it and increase the expense.

The traffic on streets other than Market Street where the complainant has cars and the number of cars operated on such streets are not at all comparable with the conditions existing on Market Street. But even under the conditions that do exist on the other streets we have great difficulty in maintaining headway on the streets, say such as Larkin Street where the traffic is relatively heavier than on other streets, a continual interruption. Larkin Street from Market to Post and Polk Street from Post Street north is a business section and a street that is used for a good deal of teaming. The width of the street would be about like Sutter and like the general run of the streets north of Market Street. Under present conditions there are frequent interruptions of street car traffic. The schedule is dis-arranged. On these streets for instance there is no room for a vehicle to pass between a car standing on the track and an automobile standing at the curb."

Recross-examination:

"The safety station now on the north side of Market east of Jones could probably be changed and put on Jones right back of the intersection, but of course that would require so much more delay, a continual stopping of cars going out Market Street; stopping before the intersecting McAllister Street cars and then making a further stop. It would complicate the operation very much. There would be two stops instead of one. The traffic coming out on Market Street now on the north side is compelled to cross the McAllister Street line of cars. If the safety station were changed to the gore the McAllister Street line would probably be the only interference with the traffic back of the safety station."

Redirect examination:

"If the safety station were moved and placed in the gore it would be bound to interfere with the other traffic going out McAllister Street. If it were put further up on McAllister Street between the car and the sidewalk it would interfere with the McAllister Street traffic, and all of these interferences I think would interfere as well with the operation of the cars just as any undue interference from other traffic on the street interferes with the operation of the cars as well. The map now shown me is a substantially correct representation of Market Street with the streets coming into Market Street, the lines of cars as they now exist, with the existing municipal
355 lines in solid red ink and the proposed lines in dotted red ink."

The map was here offered and received in evidence. The following is a photographic copy thereof:

(Here insert.)

(Here follows diagram marked page 355*a*.)

356 (Witness, continuing:)

"The total of the outstanding bonds of the United Railroads is $23,542,000 United Railroads 4% mortgage bonds. There are also approximately $12,250,000 underlying bonds, that is, the bonds of other companies that were turned into the United Railroads when it was organized. They are the bonds of the Market Street, the Ferry and Cliff, the Omnibus Cable and the Sutter Street Railroad Companies.

The average number of passengers carried on the Market Street line in a day by the Complainant is approximately 209,000. The total number of passengers transferred from intersecting lines to Market Street on Thursday, July 20, 1916, was 51,313. On the same day 78,154 transfers were issued by the Market Street lines to intersecting lines, but of these only 40,127 were received by the intersecting lines. These figures represent a fair average of the daily business except that they are rather low than otherwise; they are below normal. The 209,000 passengers carried on Market Street include the lines on Market Street which go into Market Street at any point. The difference between the 78,154 transfers issued and the 40,127 transfers received by the intersecting lines represent transfers taken by passengers but not used."

JOHN T. PIDWELL, a witness for the complainant, having been duly sworn, testified as follows:

"I am an attorney at law practicing in San Francisco and have lived here all my life. I have been practicing law more than twenty years. I have been accustomed to ride upon street-cars in San Francisco, particularly upon those operating on Market Street. I am familiar with the conditions on Market Street from Kearny Street to the Ferry, where there are four street-car tracks. I have been accustomed frequently to take passage on the street-cars oprated on the center tracks on that part of Market Street and to alight from those cars.

Q. Since the operation of the cars on the outer track on that part of Market Street, what recently has been your experience in getting on and getting off cars of the United Railroads?

Mr. Haven: Defendants object to this testimony on the same grounds as stated in the objection to the testimony heretofore offered.

The Court: You need not introduce your objections; I always deem them made; I go beyond that; I deem anything objected to except possibly the form of the question; you will not have any trouble about making up your record because your point is preserved by your first objection. After all it resolves itself into a question of law, and you might, it seems to me, practically agree on all sides obviously that convenient access to the inner car is interfered with if you permit the outer car to lie alongside of the inner car; that is a self-evident proposition.

357 Mr. Cannon: And I think it is just as obvious if the outside car is moving that there is interference in getting to the cars.

The Court: These are questions, of course, that may only become relevant as bearing on the question of whether or not the city has or has not the power to authorize the occupancy of the street or the way in the street by additional cars, and that comes back, to the question of the construction of the power of the city; of course I think it is perfectly plain that the case is not to be decided upon the question of the latitude of convenience that there might be unless the inconvenience is so great that to permit it to continue would be in effect confiscation of property.

Mr. Cannon: Or under our constitution, damage to property, which uses that term.

The Court: I should think you could curtail a great deal of this; it does not need any argument, for instance, or the testimony of witnesses, to show that that thing which is self-evident must happen; that if you have got an inner car and an outer car and a man wants to take the inner car, it is quite inconvenient for him to do it; I should say that obviously there would be greater traffic on the outer car by persons desiring to go shorter distances upon a street occupied by four cars unless the traffic is so regulated that he thinks that he can just as conveniently step across the outer track and take the inner car. I do not think argument will be necessary on that.

Mr. Cannon: We take the same view, your Honor.

The Court: So that you may curtail a great deal of this, by permitting your record to contain a few statements of that kind.

Mr. Cannon: It was only offered, if your Honor please, because the city, while admitting the physical condition, denied that it had any such effect, so in order to be on the safe side we thought we would introduce evidence as to what the facts are.

Mr. Haven: The court has described what seemed to it to be obvious, and it seems to us to be obvious, and I am perfectly willing to stipulate what the fact is.

The Witness: When I leave my office in the Mills Building, about five o'clock in the evening, to reach my home it is necessary for me to take the Haight Street car, if I am going on the United Railroad cars. When I reach the safety-station near the junction of Montgomery and Market, I have often found, or always found, that the Haight Street car would be blocked; it would be almost impossible for us to board the Haight Street car on account of the many Municipal cars that come on the track closer to the safety-station. Many times I have missed a car, and in a hurry I have taken a jitney to reach my home promptly. I have noticed many young ladies who desired to board the United Railroad cars at that place that seemed to be panic-stricken when they found the Municipal cars approach and did not seem to even stop. I have seen many other persons daily having the same difficulty that I experienced. The difficulty that I have observed that people have of getting on the United Railroad cars is the rule rather than the excep-

358 tion. I know that I myself have been deterred from taking those cars, and have given up the attempt. I know that the same difficulty is experienced at other points than Montgomery and Market streets. I know it is the case farther down at Davis—at different places—but, of course, my attention is called to it more at Montgomery and Market than at any other because there I use it most. I have often, in order to avoid the danger, walked down Market Street, but I found the same condition on account of the congestion. For instance, in walking to the safety-station at Bush and Battery I have observed the same condition there."

Cross-examination:

(Witness, continuing:)

"The condition that I have testified to occurred between five and six in the afternoon. That is the busiest hour of the day for passengers to take cars. Most everybody in offices is going home. I have frequently taken the Haight Street car; a jitney makes a little quicker time.

I noticed some stop-marks where these cars stop. The stop-marks on the Municipal line were at a different point from those on the United Railroads line. The Municipal cars, however, stopped regularly opposite the United Railroads cars. If they had stopped at the stop-marks, however, they would not do that. I have noticed that when I saw the Municipal cars come along and I wished to board the United Railroads car, I would stand on the track thinking that I could force the motorman to stop his car, but I would have to jump lively because they did not seem to obey the stop-mark.

I have had occasion to go out to court occasionally after going to my office in the morning, and have passed by the same safety-station. Going to court in the morning I generally take the jitney because I do not like to take chances on these tracks. The difficulties which I have mentioned do not exist to the same extent in the morning between nine and ten. They exist, but not to the same degree. Coming back from court I generally walk. In respect of jitneys and cars I generally take the one which comes first.

Mr. Haven: We will stipulate to the facts as suggested by the court, that it is obvious, that certain things are obvious from a mere physical inspection of the situation, and I think that is as far as anything is material in this case, and as far as that has any bearing on the final determination of this case.

Mr. Cannon: Would you stipulate that danger under those circumstances is obvious?

Mr. Haven: It does not require a stipulation as to that. There is danger from a running street-car anywhere.

Mr. Cannon: I think, if your Honor please, that probably we can safely take this course, with your Honor's permission, that we will not call any other witnesses to this point at this time, as it seems to be a pretty obvious condition to all of us, with the understanding that if Mr. Haven produces testimony attempting to disprove the obvious, then we shall be given an opportunity to call

359 The Court: Yes. I do not think that the testimony of the witness as to the danger would be very valuable because we all know that there is a good deal of danger, but the danger is increased according to the number of vehicles that we have to pilot our way through and the number of tracks we have to cross.

Mr. Cannon: Could we get an admission that many people, the number, of course, being impossible to ascertain, are deterred from taking the cars on the inner track by reason of the difficulties created by the operation of the cars on the outer track?

Mr. Haven: I do not think you need an admission on that subject. I do not admit anything on that. There is a difficulty but whether they are deterred or not I don't know.

Mr. Lull: We do not admit that they are deterred; we call it a danger from the operation of the cars, that is all."

HENRY T. JONES, a witness for the complainant, having been duly sworn, testified as follows:

"I am General Superintendent of the United Railroads and have been such a little over three years. I have been connected with the United Railroads for twenty-six years, and before becoming General Superintendent was conductor, car dispatcher, clerk, superintendent of employment and division superintendent. In the present position which I occupy and in my other positions I have had occasion to be on Market Street frequently during the different hours of the day, particularly during the rush hours. It is part of my business to observe traffic conditions on Market Street. In the ordinary course of the performance of my duties I go on Market Street for the purpose of observing traffic conditions. It is a very common occurrence to find cars banked up on the two southerly tracks from the Embarcadero as far up as Main Street. That is a very common occurrence. On the inner track the line would be that far, and on the outer track probably to Spear Street. There are not so many cars operated on the outer track. The banking up would be due to congestion on account of the traffic across the Embarcadero and traffic signals there and the loading and unloading at the loop. During the busy hours of the morning and evening, cars are running around the loop just as fast as they can load and unload them. They are started as soon as they are loaded. We have had complaints where passengers have been left on account of cars starting before the passengers were on. The early start, in such cases, would be due to the banking up of cars. Notwithstanding the fact that the cars run around the loop as fast as they can possibly be handled during the rush hours, I have frequently observed this banking up of cars with the two lines of cars abreast. I have observed the same condition, but to a lesser degree, at other traffic points on Market

360 Street where there are four tracks. I have observed it particularly at Kearny Street with the outbound cars. It is a common occurrence to see at least six cars standing there waiting, during the rush hours and frequently in the daytime, too. I have had occasion to watch passengers getting on and off the cars at different stopping places between Kearny Street and the Ferry. other witnesses to the same thing.

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It is almost impossible at times for passengers to get to the inner cars at all. I have frequently been on Market Street when a car on the inner track has been waiting there and a car on the outer track will run up on that car and scatter the people like a lot of wild sheep. I have frequently seen people, in order to get on and off a car, get between the cars that are standing there. It is a very dangerous position and it depends on the size of the man or woman whether he or she can stand there or not.

With reference to people endeavoring to get on and off cars at safety-stations where there are four tracks, at times it is practically impossible. Take Montgomery Street for instance. A car will come up and stop on the inner track. Persons go to get on that inner car and another car on the outer track will come up and scare the people and they cannot go on, although the car on the outer track is supposed to stop ten feet ahead of the car on the inner track. By the time the passengers get a-ound there is another car on the outer track coming up and it blankets them there and it is impossible for them to get on. It is a frequent condition at such a safety-station as Montgomery, or any other safety-station, to see two cars standing on the outer track, one behind the other. In such a case, people lose their car entirely. Their car goes away and loses them. They have to wait for another. This condition is a very common one. I see it several times a day. Anyone can go down there and see the same condition.

Kearny and Geary Street is a very congested center. It is not as congested at Fourth and Stockton as it is below Kearny. There are a great many people at Powell and Eddy and Fifth, and around there.

At Kearny Street and other points where there are safety-stations, the traffic, other than street-cars, goes between the curb and the safety-station. I have frequently seen congestion at those points. You see a double line of jitneys and private cars coming up there. It is almost impossible to get over through them. If those safety-stations were moved back so as to allow only a space of about 10 feet or so between the safety-station and the curb, in my judgment the automobile and other traffic could not be accommodated there. If it were diverted out to the tracks, assuming that there were four tracks there, that would increase the danger in the operation of the cars and delay the operation. In my opinion, it would make accidents more frequent. It would delay the operation of the cars. If the proposed track should be built out Market Street cutting various intersecting tracks of the United Railroads, it would cause great delay in the operation of the complainant's cars and more congestion of traffic. It would most assuredly increase the danger in
the operation of the cars. I think it would make more likely
361 an increased number of accidents. It would be bound to increase the danger of collision between cars at the crossing places.

I have frequently noticed instances where people endeavoring to get to the United Railroads' cars would give up the job. It is a common occurrence—a daily occurrence. I have seen as many as

five trying to get on a car and probably one or two would get on and the others would run away because of a car on the outer track coming up and blanketing them. I have had numerous complaints from people about that condition in getting on and off the complainant's cars. It has been a common occurrence to receive such complaints. I have also received reports of accidents happening to people trying to get on or off the United Railroads cars.

The Court:

Q. How long have the four tracks been in operation down there?

Mr. Haven: Since 1912.

Mr. Lull: During the Exposition year, 1915, if your Honor please, they were in full operation.

Mr. Cannon: That was from Geary Street.

The Court: I had this in mind: Would the revenues of the United Railroads for that part of the traffic have such a falling off or any falling off which would justify the inference that the interference with the convenient operation of the road was so serious as to impair seriously their revenue.

Mr. Cannon: We had that matter up in another litigation this year and it was a very difficult matter to get at; in fact, it could not be gotten at because these Municipal cars started to operate during the Exposition year, when conditions were altogether different.

The Court: You have offered evidence to show a very large number of passengers carried each day—some gentleman testified here to it—a very large number. Now, you are offering evidence to show that there is practically an abandonment by many of the desire to ride on the United Railroads because of the interference. Now, if the latter proposition is entirely accurate and a great many people desist from using the United Railroads because of the danger that would naturally exist, there would be a decrease in the financial receipts of the cars because of the falling off of the passenger traffic.

Mr. Cannon: There are two answers; in the first place, as I stated, conditions during that Exposition year were so different——

The Court: They were abnormal, I believe.

Mr. Cannon: There could be no basis upon which such a calculation could actually be made. In the second place, the Geary Street cars now,—the Municipal cars—now leave Market Street at Geary Street. There is only this short distance there. The traffic that is peculiar to Market Street from Geary Street to the Ferry is very light, because it would only consist of people that would get on the inbound cars between Geary and the Embarcadero, and people that would get off the outbound cars between Market and Geary; that is the
362 only basis upon which we could obtain anything like a satisfactory calculation relating to the traffic that is peculiar to that part of Market Street. Now, we did in connection with other cases have certain tests made from this point to this point, but there was nothing with which these tests could be compared, because there never had been any tests made before the operation of these cars. We only had the benefit of these tests while this was actually going on. Geary

Street, of course, after leaving Market Street, goes into a certain section of the city, and a person who would want to ride on the Haight Street car, for instance, would go into an altogether different part of the city, so that that particular person might have a great deal of difficulty in getting on the inner tracks and yet he would not take the car on the outer track because it would not take him to his destination; so that there are so many difficulties in the way of that and conditions were such during the Exposition year that we have never been able to find any basis of calculation that would afford us any light along that line at all; we would be very glad if we could, because then we might have a basis for another sort of a suit sometime, but we have not been able to find any that would satisfy ourselves as being in any way reasonable. The conditions, if your Honor please, would be altogether different if the proposed track was constructed because then any person getting on at the Ferry who would want to go clear out to Castro and Market would have his choice of the Municipal or United Railroads cars. As conditions exist at the present time, you have not that choice, because the Municipal cars leave Market and Geary Streets and it is impossible to ride on a Municipal car out to Castro and Seventeenth. The same situation exists with relation to Eddy Street or transferring to Ellis or Polk.

The Court: In other words, the element of competition would be a much more serious one if you had four tracks extending higher on Market Street than is present today, because of the limited extent to which the four tracks operate.

Mr. Cannon: The element of competition, of course, would come in, but the element of difficulty and danger would also come in because if a person has the choice of two cars, each running to his destination, he is going to take the most convenient and the least dangerous,—a natural thing; so that competition would not be the only thing to be considered, although the element of competition will come into this case in connection with certain features of the law and the legal effect of it."

Cross-examination:

"The outer car is supposed to stay ten feet ahead of the inner one. I have not seen any orders to the effect that if there are two cars on the outer track and one on the inner track the second car on the outer track upon coming up shall leave a space between it and the car ahead of it. There is no ordinance that the car on the outer
363 track stop ten feet ahead of the one on the inner track. It is simply an arrangement. There is an arrangement to provide a space between cars on the track, but it is not carried out. We have made a strict rule, that the cars of our system should not pass a car on the inner track at all, so that when a car on the inner track is stopped and one of our cars on the outer track comes along, it waits until the car on the inner track has passed on its way. The cars of the municipal railroad on the outer track do not do the same thing. I do not know whether they are instructed to do so or not. When our cars on the outer track stop they do so in order not to interfere with

the car on the inner track which is stopped. They do not interfere that way. If that regulation were carried out on both lines they would not interfere with the inner line, notwithstanding that the car on the inner line may have stopped. When the cars on the inner line were banked up it was not always due to some interruption of traffic. It was frequently so, however. The other causes are the turn at the loop, intersections and all that sort of thing. That is an interruption of traffic. It is a regular thing. Cars are held up at cross streets, or possibly there is a breakdown, an accident to a team or something of that sort that stops the cars. The banking up at the Ferry occurs during the rush hours and at all times during the day, even in the morning. My attention was drawn to it last week on account of the cars on the inner track being blocked and passengers calling me up and saying that they had missed the nine o'clock boat. I went down to investigate and I found the cars blocked on the inner track as far as between Main Street and the street west of it. That was during the morning rush hours as late as nine o'clock in the morning.

Our motormen conform to their instructions to stop the outer cars on our line. I do not know anything about the instructions to the motormen on the municipal line."

Redirect examination:

"When a United Railroads car stops because a municipal car is standing on the inner track waiting to receive or let off passengers, that delays the operation of our cars on Market Street and increases the expense. If four tracks were to be continued all the way out Market Street and our cars were required to stop every time they found a municipal car taking on or letting off passengers, the increase in such delay would be a fright.

I am acquainted with San Francisco and its centers of population. The large sections shown as blocks on the map attached to the Bill of Complaint you cannot say are thickly inhabited. It is all sparsely inhabited there. There is very little in the section on the southwest corner of the map. All of that section is very sparsely inhabited. Taking it as a rule, the United Railroads cars run to every part of the city where the population is dense or where it is greatly
364 populated. They reach every part of the city. The parts of the city where the cars do not run are sparsely settled."

Recross-examination:

"I am familiar with the fact that there is a tunnel being built through Twin Peaks. The service to the country on the other side of Twin Peaks at the present time is very good so far as the public is concerned. They have too good a service. I have not heard any great kicks about the service they are getting out there. Of course everyone kicks. They would like to have a car every two or three minutes. I have heard complaints. I do not know anything about any community out there that gives our road a subsidy to run at the present time. I do not know whether the Parkside road is

running under such conditions. I have heard small kicks such as the people at Parkside complaining about inadequate service, but it does not amount to anything. We are giving a service out there that does not pay the platform expense to run the cars.

There are a great many subdivisions opened recently the other side of Twin Peaks. I do not know how many houses have been built there lately. I have not been out there lately. I know that they have laid out streets. I do not know that the proprietors of those subdivisions have complained about the inadequate street railroad service. They have all the service that is necessary out there. Nobody has told me that they have all the service that is necessary. I do not know whether they are dissatisfied, but as I told you, the passengers we get to take out there do not pay the platform expenses.

I do not know what you mean by Ingleside Terrace being built up largely in the last few years. You find a house here and there. Probably in thirty years there will be 100,000 people south of Twin Peaks Tunnel. With our present lines—with the Mission Street Line and the Parkside Line, we could give adequate service for 100,000 people living on the other side of Twin Peaks Tunnel. The Parkside and the Mission Line is all that goes out in that country. There is not as much travel in that part of the city as there is in other parts. Go out in the Richmond and look at the improvements out there. The difference between the service in the Richmond and the Twin Peaks country is that there were not the people out in the Twin Peaks country to kick. There was nothing out there to run cars for. In order to build a country up you have to give good service. That is the reason the Richmond territory is built up and the Twin Peaks is not.

I have not been out for a long time through any portion of the city through which it is proposed to build the new Church Street line. The line of the United Railroads on Guerrero Street is within two blocks. I do not know whether the line of the United Railroads on Guerrero Street is separated from Church Street by a very steep grade. The portion of the city referred to as being on the southwest corner of the map and which I testified was sparsely
365 inhabited is the Sunset District, the Ingleside District and the Parkside District, all in there. It is not the fact that the portion of the so-called Sunset District lying between Golden Gate Park on the north and what is marked on the map as the Rancho San Miguel or Almshouse Tract, is very thickly populated. Referring to the blocks between there and the Golden Gate Park, those blocks are not thickly populated. Up as far as Ninth Avenue they have done fairly well of late. From Ninth Avenue to the Park it is not thickly populated. There are places that are not thickly populated. There has been a great deal of growth and development all over the city in the last few years, including this district. There are a great many areas in the different parts of the city and county occupied by hills and forests, where there are no people living at all.

Mr. Cannon: If your Honor please, I have several other witnesses here who will give testimony along the line that Mr. Pidwell gave, but I do not like to call them in view of your Honor's statement as to what might be considered obvious.

The Court: I should think it would not be necessary to call them.

Mr. Cannon: Very well, we will not call them in view of your Honor's suggestion."

It was here stipulated and agreed that the city had paid to the Complainant for the loop $2058.50, and that that amount represented approximately one-fifth of the cost of the outer loop.

The Complainant here offered and there was received in evidence a copy of the resolution dated February 29, 1916, passed by the Board of Harbor Commissioners which constitutes the permit under which both the United Railroads and the City operate cars around the loop on the Embarcadero. Said resolution reads as follows:

"(As Amended 2/29/16.)

Resolved that any and all permits, licenses, and rights, of any and every kind whatsoever, heretofore given or granted to the United Railroads of San Francisco to install, build or maintain a railroad track on the Embarcadero in front of the Ferry Building opposite the foot of Market Street, in or on the location known as the outer loop, and particularly the permit, license or right to maintain the present track on said outer loop location given by the resolu-
366 tion of this Board on, to-wit, the 17th day of May, 1906, and entered in the minutes of the meeting of the Board on said day in Vol. 17, page 142, of the Record of this Board, be and the same hereby are revoked, effective with the expiration of the 31st day of March, 1916; and be it further

Resolved that a permit effective April 1st, 1916, to build and maintain a new railroad track on the identical location of the present said outer loop, and connected up with the tracks on Market Street in the same manner as existed on to-wit, the 17th day of February, 1916, be and hereby is granted jointly to the City and County of San Francisco, a municipal corporation, for the use of its street-car lines, known as the "A," "B," "C" and "D" lines of its Municipal Railway system and to said United Railroads of San Francisco for the use of its street-car lines, known as Nos. 1, 2, 3, 4, 5, 21 and 32 lines, subject to the following conditions:

1. No limit is placed by this Board at this time on the number of cars of any of said designated lines that may use said outer loop.

2. No other line of either railway system shall use said outer loop except by a special permit of this Board, evidenced by a resolution in its minutes.

3. The cost of construction, maintenance and replacement of such proposed new track on said outer loop location shall be borne by both said licensees in proportion to the use thereof by the licensees, respectively, except that as to said "A" and "B" lines no burdens

shall be construed as being imposed upon said City and County over and above the obligations as to the same already resting upon said City and County under its existing agreement with the United Railroads.

4. The permit to construct and maintain said proposed new track shall be construed to include and does include the necessary poles and wires for electrical transmission to be used in connection therewith, and the foregoing provisions as to costs apply likewise to them.

5. In case of disputes between the two licensees as to costs herein mentioned, such disputes shall be settled by this Board.

6. If both licensees should agree not to build such proposed new track, but should elect to continue the use by both of the present track in such outer loop location, they shall be at liberty to do so, and the cost of the maintenance, upkeep and repair of the track on said outer loop location shall be borne and paid by each licensee, in the same proportion and in the same manner as fixed by paragraph 3 hereof for the payment of the cost of maintenance of said proposed new track.

In the event of the election of said licensees to continue the use of the present track in said outer loop location, this permit shall be construed as applying to and including said location for such outer loop, as a permit for the joint use thereof, as aforesaid,
367 and said present track shall thereupon come under the operation of all of the conditions of this permit, the same as if said new track had been constructed.

If within the first five days of said month of April, 1916, the installation and construction of such proposed new track on such outer loop location shall not have been actually commenced in good faith, then the use thereafter by either said licensee of the present track on such outer loop location shall be construed as an acceptance by it of this permit under all the conditions thereof, as to such outer loop location and as to said present track thereon and as to the use thereof as aforesaid.

7. This permit is not assignable, either in whole or in part.

8. Said licensees shall conform to such reasonable regulations or requirements, as may be made from time to time by the Board of State Harbor Commissioners for the protection of passengers and pedestrians.

9. All work done under and pursuant to this permit shall be done at the charge and expense of said licensees and said Embarcadero shall be left and kept in its present good condition.

10. Said construction and maintenance work shall be done to the satisfaction of the Chief Engineer of the Board of State Harbor Commissioners and subject to the approval of said Board.

11. No alteration or change in the location of either said outer loop or of the inner loop, or of the cross-overs, or the poles or wires, shall be made by said licensees, or either of them, except after an application in writing and upon approval by this Board, evidenced by a resolution in its minutes.

12. The Board reserves the right to revoke, alter or amend this permit either in whole or in part, or as to any and every feature

thereof, with or without notice, except that where notice in any respect is required to be given by law such notice shall be given.

Attest:
The foregoing is a full, true and correct copy of a resolution this day passed by the Board of State Harbor Commissioners.
Dated February 29, 1916.

LEO V. MERLE, JR.,
Secy. Board of State Harbor Commissioners."

368 "Mr. Cannon: The Board of Harbor Commissioners is an instrument of the state; the title rests in the state; we may have some iittle dispute as to the line here. The allegation in the answer is that the entire loop rests upon state property. We do not wish to be in the position of conceding or admitting that the entire loop rests on state property, because a part of this loop runs back beyond the line of the Embarcadero, and there is some question as to just where the state lines are.

The Court: You do not want to be bound precisely to the lines. As I understand that, the Board of Harbor Commissioners would have the right to give a privilege in the nature of an easement to these railroad companies to make a loop.

Mr. Cannon: A revocable license, revocable upon 30 days' notice under the statute, and, therefore, changeable at any time. We are willing to admit that the greater part of this loop is on state property, but we do not want to be considered as making any admission as to where the definite line is. Would you gentlemen make any concession as to the physical possibility or impossibility of building another loop, an additional loop at that point? You allege in your answer that there could be possibly another loop constructed, or some other reasonable means employed. I think all of the engineers for the Board of Harbor Commissioners and yourselves all agreed at the time this present permit was up, that it was physically impossible to build another loop at that point. I don't know that.

Mr. Lull: As I recall it, the Harbor Commission's principal objection to installing another loop around there was the fact that it would interfere with the Belt Line Railroad, but that physically it would be possible, by making a rearrangement; but of course it was unnecessary in view of the conditions existing there at the time the application was made for permission to run "C" and "D" cars around there.

Mr. Cannon: You will admit that between the sidewalk in front of the Ferry Building and the nearest track, being the track of the outer loop, there is another railroad, a steam railroad, known as the Belt Line Railroad, running.

Mr. Lull: Used at night, only.

Mr. Cannon: I have seen trains there in the daylight.

Mr. Abbott: I have seen them at nine o'clock in the morning, and our cars have been blocked.

Mr. Cannon: You will admit its existence there, a steam railroad?

Mr. Lull: There is a track there used for the Belt Line Railroad,

which is a line used by the Harbor Commissioners to haul cars to and from the various docks, freight cars.

Mr. Cannon: But those tracks lie, at least the tracks of the Belt Line Railroad lie very close to the track of the outer loop.

Mr. Lull: I think that is correct.

369 Mr. Cannon: On either side of the loop the space is taken up in various other ways, isn't it, by stands for jitneys, automobiles and various things occupying the front of the Ferry Building on both sides of the loop?

Mr. Lull: There are no permanent improvements on the street excepting posts to block off the different sections of the street; they are used by jitneys and automobiles as stands at the present time, and by busses."

It was here admitted by the defendants that the present Board of Harbor Commissioners have declared that they would not permit an additional loop on the Embarcadero; that they did not deem it advisable under present conditions to put another loop there.

It is also admitted by the defendants that a cable line of United Railroads cars runs on Sacramento Street and turns the corner and goes off in a northerly direction to a terminus on the north of the loop. It is also admitted that a line of the United Railroad cars comes down Broadway along the Embarcadero to its terminus near the loop in front of the Ferry Building. It is also admitted that the Union Street line of the city comes southerly on the Embarcadero, and also has its terminus near the double loop.

It is also admitted that the lines of the United Railroads running down Mission, Howard and Folsom Streets into the Embarcadero run north to their several termini on different tracks a short distance south of the loop.

Complainant here offered and there was received in evidence Ordinance No. 20 N. S., approved June 12, 1906, authorizing and directing United Railroads of San Francisco to operate all of its several cable railway lines, so far as grades would permit, by electricity by means of the so-called overhead trolley system. Said ordinance reads as follows:

370 "Ordinance No. 20 (New Series).

An ordinance authorizing and directing the United Railroads of San Francisco to operate all of their several cable railway lines, so far as grades will permit, by electricity, by means of the so-called overhead trolley system.

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The United Railroads of San Francisco is hereby authorized and directed to operate all of its several cable railway lines and franchises, so far as grades will permit, by electricity, by means of the so-called overhead trolley system, and to erect the necessary poles and string the necessary wires and provide and use the proper and necessary means to that end.

Section 2. The work of installing said electrical equipment shall be immediately begun and shall be prosecuted with all possible expedition and without interruption until said cable lines and franchises, so far as grades will permit, are equipped for electric operation.

Section 3. Said electrical equipment shall be first class in every particular and shall include highly ornamental poles along Market Street from the Ferry to Valencia Street, and also Sutter Street from Market street to the west line of Van Ness Avenue, upon each of which said poles on Market street and upon every alternate pole on Sutter street, said United Railroads shall install and maintain, at its own expense and without any expense to the city, electric lights for the lighting of said Market street from the Ferry to Valencia street, and of said Sutter street from Market street to the west line of Van Ness Avenue.

First-class iron poles shall be used in the permanent construction of all of said lines, and the feed wires shall be carried underground on Market street from the Ferry to Valencia street, and on Sutter street from Market street to the west side of Van Ness Avenue. Provided that temporary construction may be employed until material can be obtained for permanent construction in accordance with the terms of this ordinance, such material to be obtained with all possible expedition.

Section 4. Nothing in this ordinance contained shall be so construed as to extend any franchise or franchises now held by said United Railroads beyond the time limited in any of said franchises, respectively, nor are any rights granted or intended to be granted hereby, save and except alone the rights above specifically set forth and described; it being distinctly understood that all of the existing rights, duties, obligations and contracts of the said United Railroads of San Francisco, and the said city and county of San Francisco, including the payment of all percentages of receipts now pro-
371 vided for, shall remain unchanged and unaffected by reason of anything herein contained, save and except that said several cable railway lines of said United Railroads of San Francisco may and shall be hereafter operated by electricity in the manner hereinbefore set forth.

In Board of Supervisors.

San Francisco, June 11, 1906.

After having been published five successive days, according to law, taken up and finally passed by the following vote:

Ayes—Supervisors Boxton, Coffey, Coleman, Davis, Duffey, Furey, Gallagher, Harrigan, Kelly, Lonergan, Mamlock, McGushin, Nicholas, Phillips, Rea, Sanderson, Walsh, Wilson.

GEO. B. KEANE, *Clerk.*

Approved, San Francisco, June 12, 1906.

E. E. SCHMITZ,

Mayor and ex-Officio President of the Board of Supervisors."

372 It was thereupon admitted that after the granting of the foregoing permit all of the lines on Market Street which at that time were operated as cable lines, were transformed into electric lines, the old cable tracks taken out and new tracks built for the operation of electric cars by means of overhead trolleys, and that ever since that reconstruction the cars have been operated and are being operated by electricity by means of the overhead trolley.

It was next admitted by the Complainant that the allegation in the Bill of Complaint that all persons going to and coming from the Ferry use cars of the Complainant was a mistake, and that a considerable fraction of such people use the municipal cars.

It was next stipulated and agreed that the width of Church Street is 82½ feet with present actual sidewalks of 15 feet, and a distance between curbs of 52½ feet.

The complainant here rested.

A. S. BALDWIN, a witness for the defendants, having been first duly sworn, testified as follows:

"I am a resident of San Francisco and have resided here about thirty-seven years. My business is real estate. I have been engaged in that business in the City and County of San Francisco thirty-one years. In connection with my business I have become familiar with the general physical situation of the City and County of San Francisco and its respective portions. I have been rather actively engaged during the last four years in the sale and development of the portion of the City and County of San Francisco marked on Exhibit 'E' to the Complainant's amended Bill of Complaint as the Rancho San Miguel. About four years ago I organized the Residential Development Company which bought about seven hundred acres from the Sutro Estate. We have sold to Spring & Meyerstein one tract of land which is now known as Claremont Court, Merritt Terrace, Forest Hill Extension and El Portal Tract. We also sold to Newell-Murdoch people the property known as Forest Hill; also to Mason-McDuffie Company St. Francis Wood property, and recently sold to Fernando Nelson about fifty acres at the western portal of the tunnel, which he is about to develop and build on. The 'S' in the words 'San Miguel Rancho' on Exhibit 'E' to the amended bill of complaint
373 would approximately represent the westerly portal of Twin Peaks Tunnel. Practically all the various tracts that I have mentioned as having sold to various individuals and companies are in process of development. So far as acreage is concerned, I should think probably two hundred acres within the boundaries of those tracts have been improved with up-to-date street-work and other like improvements, and have been subdivided into building lots. Of course, there are some undivided portions of those tracts. The companies that have bought the tracts are selling lots and building houses and developing the property generally.

With reference to the street railway service in the portion of the city which I have just been discussing, I think that considering the route that the roads have to take to get there it may be fairly ade-

quate, but the service, as I understand it, is a twelve to fifteen-minute headway. The routes that the roads must take, with hardly any exception, are so indirect that they result in not giving the proper service. In other words, there is no inducement hardly to anybody to go out there to live, except with the expectation of obtaining more direct and better service in the future. That expectation is the hope of service through the Twin Peaks Tunnel now in course of construction and which is expected to be finished by next year. I had occasion to have one of my men recently take the running time from the termination of car 17, which is in front of Ingleside Terrace—I don't know the name of the street where it terminates. He took the time from there by way of Nineteenth and Twentieth Avenues and Haight Street to Third and Market Streets. The time was 44 minutes. The time by way of car No. 12, from the same point, along Ocean Avenue, Mission Street, to Third and Mission, was 37 minutes.

Mr. Cannon: There cannot be any question that going through the Twin Peaks Tunnel by way of Market Street would shorten the distance very materially; no question about that.

Mr. Haven: It would shorten it by half, would it not?

Mr. Cannon: I doubt if it would; it would shorten the time materially, however.

The Witness: It would shorten it very much as compared with the route taken by car No. 17 around by Nineteenth Avenue and Twentieth Avenue.

Ingleside Terrace does not seem to be on the map. It is south of the 'R' in the word 'Rancho'—south of Ocean Avenue where the red line is. The red line immediately below the word 'Rancho' is where the line of the United Railroads concerning which I have testified is situated. Following that to the left of the Rancho San Miguel, the red line running in a straight line to the Park is the Nineteenth and Twentieth Avenue line about which I have testified. The first line concerning which I gave the time runs over Nineteenth and
374 Twentieth Avenue to the edge of the Park, and then along the Park and down Haight Street to the Ferry. The other line concerning which I gave the time is the Ocean Avenue line running on the meandering line to Mission Street to the right and down Mission Street to the center of the city and the ferries. Those are the only two lines which now serve Ingleside Terrace.

The 9th Avenue line serves Forest Hill, or a portion of it. It is very convenient to the upper portion of Forest Hill, but it is quite a walk to the southerly portion of Forest Hill, over the hill and then to the 9th Avenue line. That particular subdivision is quite hilly. They are looking forward to the Laguna Honda Station there to take care of that end. They could walk downhill to that and walk uphill coming back, or they could come back the other way. They could come back by the United Railroads line and walk down the hill, thus walking downhill both ways. When I speak of the Laguna Honda station, I mean a station on the proposed line running through Twin Peaks.

I think that the lack of development of the portion of the city west of Twin Peaks is due to lack of adequate transportation, and except for our belief in that we certainly would not have invested as heavily as we have to build the tunnel. The tunnel is being built entirely by the property owners, and the people who own property west of the west portal are contributing over three million dollars towards its construction. In my opinion, the Twin Peaks Tunnel is the solution of the traffic condition there. The tunnel will be 11,800 feet long and will cost about four million dollars. The interests which I represent and myself are relying and hoping for a trolley line, naturally through the tunnel that will take us down through the heart of the city to the Ferry. The natural way from the mouth of the tunnel to the heart of the city, if it is a surface line, is Market Street. I can see no alternative.

I am quite familiar with the condition of the population of the portion of the city lying south of Golden Gate Park and commonly called the Sunset District. That district is quite thickly settled up and populated, beginning at 1st Avenue and going out as far as 12th Avenue, and running south, I should say, to probably Kirkham or Lawton, three or four blocks above the Park. That is quite thickly populated, and the balance of it is somewhat sparsely settled."

Cross-examination:

"The 9th Avenue line ends about at the point represented by the letter "A" in the Almshouse Tract as shown upon the map. It stops at Pacheco Street, I think—substantially at the line of what is now Forest Hill. I think they call it Forest Hill Court. Newell-Murdoch bought from us eighty acres to the south of us, and then they bought from the city twenty-three acres of what was originally a portion of the Almshouse Tract, and that is now a part of Forest Hill. The 9th Avenue line terminates there and serves that section of Forest Hill.

I have not made any test to see how long it would take to go
375 from that point—from the terminus of that line—to Third and Market Streets. That is a considerably shorter distance than the others. I think Murdoch told me it was 35 minutes, but that is a matter of which I am not positive.

The Twin Peaks Tunnel commences substantially at the end of Market Street at 17th and Castro. Its direction is not that of a prolongation of Market Street. It has a slight elbow or bend in it. The foot of the Twin Peaks is right at 17th and Castro Streets, and the tunnel goes right under the Twin Peaks. In its course there are certain stations before coming to the end of the tunnel itself. The first station is what they call Eureka Valley station, which is, I think, about three blocks west of Castro Street. The next one is Laguna Honda station, which is near Forest Hill, and then comes the westerly portal. The westerly portal is not more than four or five hundred feet from the northerly portion of St. Francis Woods, but from the westerly portion of it, or from its intersection of the Sloat Boulevard, I think it is about 3,000 feet. I imagine that the westerly

portal would probably be about 4,000 feet from Ingleside Terrace—the better part of a mile.

If an electric line were built through the Twin Peaks Tunnel and served Forest Hill and the other tracts I have mentioned—St. Francis Wood and Ingleside Terrace and all that country out there—assuming that the building of such a line would cause the country to grow very rapidly, the greater the growth the more cars that would be required. In order to give an adequate service, I should say we ought to have a five-minute headway. The greater the growth the shorter would be the headway required.

If the line from the easterly portal of Twin Peaks Tunnel to the business section of the city is to be a surface line, it seems to me that Market Street is the logical street for a direct line. Any other line would be operated roundabout. If you went down 16th Street it would be a corkscrew line. You could go down 17th Street; it is perfectly clear of street-car service down to Mission and Howard and Folsom. You could get down to Mission Street, but Mission Street is pretty well crowded now with cars. You could not very well build four tracks on Mission Street. Any route other than down Market Street would be extremely tortuous and very undesirable when considering the investment has been made and the necessity, it seems to me, to assist in the development, or the desirability to assist in the development, of that section. Unless we are going to have elevated and subways, it would be better for our particular section if the line ran directly down Market Street. I don't see any other route. In making this statement I am only considering the convenience of our section and not the injury that such a line might do to anybody else.

Between the westerly portion and the easterly portion of the tunnel is a ridge of hills. As far down as Sloat Boulevard it is a slope with more or less steep places. West of the Twin Peaks and out to
376 the ocean a great deal of the land is in vegetable gardens, but there are no sand dunes. Between probably "R" Street—I do not know its modern name—and perhaps six or seven blocks from 20th Avenue to the ocean it is almost all sand hills. South of the Sloat Boulevard and the Rancho Laguna de la Merced, and out in there, it is practically unoccupied as far as habitations are concerned. That is because the water company has been holding its property intact. Out on the Junipero Serra Boulevard are the golf links, which are being moved now to the county line. In the same neighborhood and beyond are large numbers of vegetable gardens. There are practically no people out there. The main portion of the present and prospective buildings is in the tracts that I have mentioned—St. Francis Wood, Ingleside Terrace, Forest Hill, Parkside, and one or two others that I have mentioned. Parkside is not built up to any extent yet, which is, I think, due to lack of adequate transportation. I think there are as many houses in Parkside as there are in the other tracts. There are probably four hundred or five hundred houses in those different tracts. A line from the westerly portal of the tunnel to the Parkside would fill that district very rapidly. The same line that served Parkside would not serve Ingleside. You

would have to put another line there. The line that served Forest Hill would serve Ingleside. Forest Hill would be served by the main line. That line might go on to Ingleside. There would, in all probability, be branch lines out there that would have to transfer to the main line. At least, we are indulging in the hope of branch lines."

Redirect examination:

"The property owned by the Spring Valley Water Company is the portion on the map marked 'Rancho de la Laguna Merced.' Subdivisions of several hundred acres in the northerly portion of this tract are in process of being made. That would be served by the same Twin Peaks tunnel and transportation system."

JOSEPH A. LEONARD, a witness for the defendants, having been first duly sworn, testified as follows:

"I live in San Francisco and have lived here about thirty-three years. I live in Ingleside Terraces. I have been connected with the development of that particular property. I am familiar with the portion of the City of San Francisco lying west of the proposed Twin Peaks Tunnel. There are 147.78 acres in Ingleside Terraces. There are now about 74 residences there. About 224 people are residing there at the present time. At the present time we have the Mission Street line running from Ingleside Terraces, and the time we have calculated on is about 35 to 38 minutes to Fourth and Mission Streets. The time on the Ellis Street line—car No. 17—is about 42 minutes to Fourth and Market Streets. We have a headway varying
377 from 11 to 14 minutes on car No. 17, and a headway varying from 8 to 14 minutes on car No. 12. The transportation facilities are not adequate for present needs. They are not sufficient. I am under the impression that if we had had an adequate service for the last four years—we commenced populating Ingleside Terraces four years ago—we would have had eight or ten times the population there that we have now. We have sold in the Ingleside Terraces up to the present time 336 houses or 785 lots. I think about half of the sales have been made for the purpose of building residences. Those people are awaiting better transportation before they build. The transportation would come, in the first place, through the Twin Peaks Tunnel. The calculation we have made is that, if we have direct transportation through Twin Peaks Tunnel down Market Street, we will reach Fourth and Market Street in 20 minutes, whereas it now requires 42 minutes."

Cross-examination:

"It is not possible under present conditions for a resident of Ingleside Terraces to get a car about every five, six, or seven minutes, because one car runs in one direction and one in the other, and they very frequently start at the same time from the Terrace. If they did not start at the same time but alternately from a point midway be-

tween their present respective starting points, then it would be possible to get a car about every five or six minutes. I do not think I am mistaken about the headway of car No. 12. If it is six minutes, I have never discovered it. I have looked for it but I have not timed it. The headway on No. 17 is not 10½ minutes. We have an agreement with the United Railroads for running our service on a 11-minute headway. Of course, if it were 10½ we would not object. I am personally interested in the development of Ingleside Terraces."

C. C. YOUNG, a witness for the defendants, having been first duly sworn, testified as follows:

"My business is subdividing real estate. I am connected with the Mason-McDuffie Company. That company is the owner under the name of Westgate Park Company of the property known as St. Francis Wood. It has been the owner of that property a little over four years. I have been familiar with the tract during that time. It has 176 acres and a fraction—pretty near 177 acres. We have subdivided, I should say, about 70 acres of it, and put in streets and sewers and improvements of that kind very fully. I am familiar with the facilities for street railway transportation in connection with the territory included in St. Francis Wood and the surrounding parts of the city. I should say that the service now rendered was in-
adequate, principally because of the roundabout routes that
378 the cars take. I make no particular objection personally to the headway, considering the sparsely populated portion of our property at the present time, but the route and the hills that the cars have to traverse make it very difficult for the property owners to get there. From my contact with prospective buyers and my efforts in making sales, I know that it is practically impossible to make sales now with the present car service, owing to the length of time it takes to reach the property. If the time were cut in two, I would expect the tract to fill up at once. I have had that objection made by prospective purchasers hundreds of times. We will have between six hundred and seven hundred lots in the tract. We would hope to see practically all of it sold—a large portion of it built on within the next four or five years, if adequate service were had. The idea we have always had is to get that service through Twin Peaks Tunnel."

Cross-examination:

"When we have the tract fully developed we will have something over 600 lots, I should say. We generally figure on about five to a family, including household servants, and so forth. We figure on a population of say between 3000 and 4000. I am acquainted with the other tracts out there—Forest Hill and Ingleside—as a neighbor. With reference to the number of people that they would accommodate if fully filled up, the size of the lot would be an element that would enter into that. Ingleside would give them the same sized lots we are building on. Certain of them have a lot not quite as wide and more in proportion to the acreage. I do not know what

their acreage is. If the tracts to be served by a street-car line through Twin Peaks Tunnel should comprise Ingleside, St. Francis Wood, Claremont Court, Merritt's Terrace, Forest Hill and the various Forest Hill extensions, and El Portal, so far as they have been developed in there, I should judge that if it were fully filled up on those tracts there might be from 12,000 to 15,000 people there, anyway. There is still room for some tracts out there,—some very beautiful country. There is a good deal of very nice country just beyond our tracts.

With the proposed service through Twin Peaks Tunnel, the traffic would immediately upon emerging from the tunnel come down Market Street at 17th and Castro. I should judge we ought to have a 5-minute service on Market Street. I should think for a resident district of that kind that would be adequate. For present needs, I have no objection to the present headway. My observation is that a 5-minute headway is not a bad headway for a residential district such as that would be, in an outlying district. The greater the number of people the greater the number of cars required, and to a certain extent the more cars the briefer headway."

M. M. O'SHAUGHNESSY, a witness for the defendants, having been first duly sworn, testified as follows:

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"I am City Engineer of San Francisco and will have been such four years the first of next September. I am a civil engineer by profession and have been such thirty-one years. I am a member of the American Society of Civil Engineers. During the thirty-one years I have been in active practice as a civil engineer, I have been familiar with the establishment and development of what is known as the Municipal Railway System in the City and County of San Francisco. The railroad was first started in 1912 on Geary Street. The first part of it constructed was from Devisadero Street westerly as far as 23d Avenue, and on 10th Avenue from Geary Street to Golden Gate Park. When I took charge of it as city engineer, the portion from Devisadero Street to Kearny was under construction. That portion was completed in June, 1913. The length of the present Municipal Railway System is 42.78 miles of single track. In addition to the lines running on Geary Street the system covers the Union Street line from the Ferry to the Presidio; the Van Ness Avenue line from Fort Mason to and along Van Ness Avenue and 11th Street, and down Potrero Avenue to 25th; and the Church Street line from 16th street to Thirtieth. The last named line is not now in operation. It was completed about the first of last June. It is the last extension to the Municipal Railway System that has been made. It is not now in operation because we have been enjoined by an injunction from extending tracks along Church Street from 16th Street to Market and down Market to Van Ness Avenue. That is the injunction in the present suit. The Church Street line down to Market Street is completed and ready for operation, and is not being used on account of the present litigation. In naming

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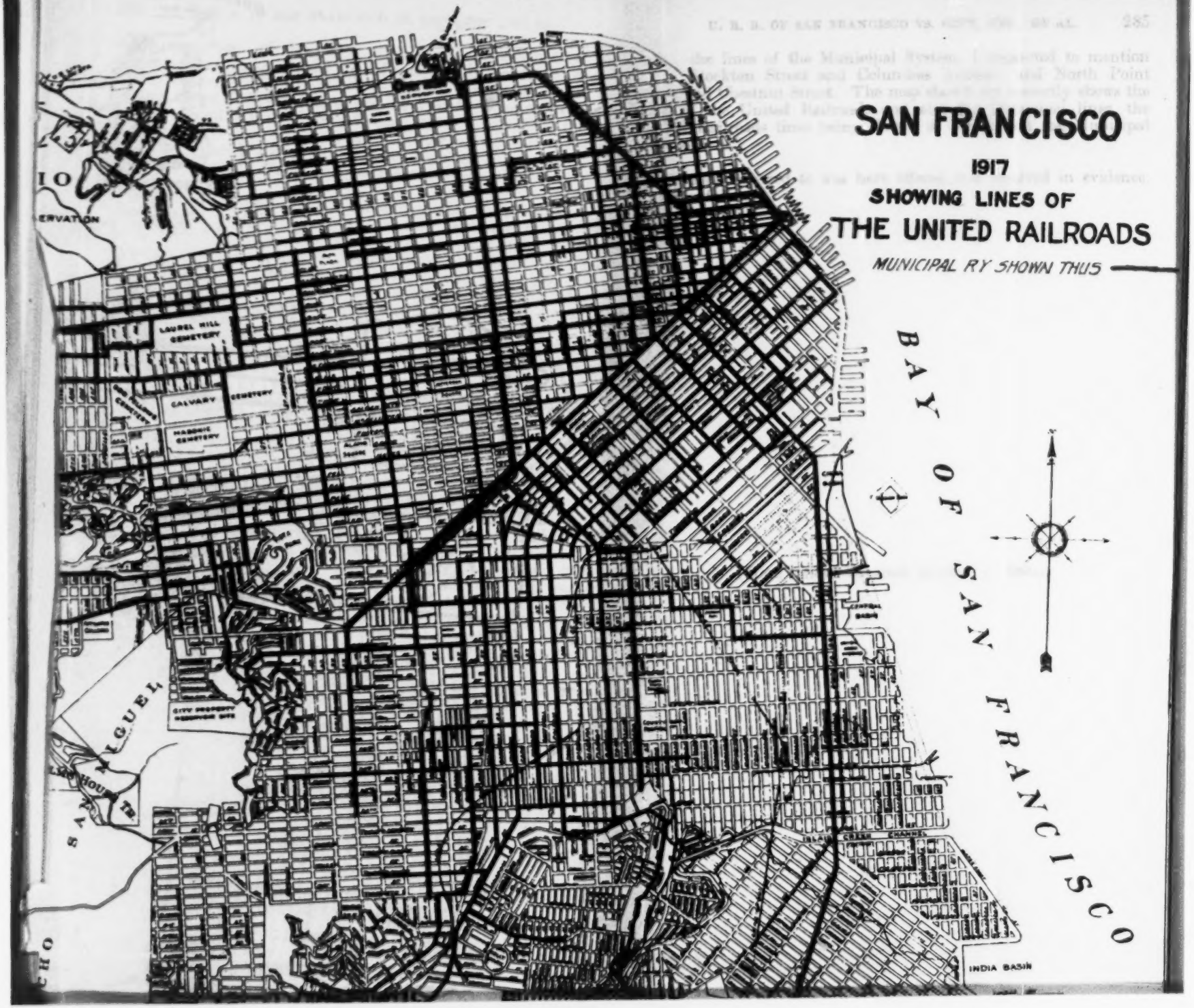
SAN FRANCISCO
1917
SHOWING LINES OF
THE UNITED RAILROADS
MUNICIPAL RY SHOWN THUS
BAY OF SAN FRANCISCO
LAUREL HILL CEMETERY
CALVARY CEMETERY
MASONIC CEMETERY
SAN MIGUEL
INDIA BASIN

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LINCOLN PARK
GOLDEN GATE
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380 the lines of the Municipal System, I neglected to mention Stockton Street and Columbus Avenue; and North Point Street and Chestnut Street. The map shown me correctly shows the lines of the United Railroads and also the Municipal lines, the United Railroads lines being shown in black, and the Municipal lines in blue."

The map referred to was here offered and received in evidence, and is as follows:

(Here follows diagram marked p. 380*a*.)

381 "The Witness: The Church Street line runs on Church Street from 16th Street down to 30th except for a detour about half a block easterly between 20th and 22nd streets. The reason for the detour is that there was a very steep grade of 19 per cent on Church Street, and an electric line is not desirable on over a 10 per cent grade; so in order to make the line electric we had to make that detour and acquire a private right of way costing very nearly $200,000. The Church Street line figures prominently for two reasons: one is that it covers a district where present lines are very remote, an undeveloped section; secondly, it is the only street with feasible grades north and south that is not occupied by an existing franchise. It was the only gate or doorway that was open to the city to build a street railway in this section of the city, and the people from this section came into the Board of Supervisors when we were considering the construction and extension of railway lines, and demanded that they get better service in that section and that the city build a line there.

With reference to the adequacy of street railway service in that section, at certain times in the day—in the morning and in the evening—the conditions four years ago were practically intolerable. The people could not get to or from their work on account of the congestion on the cars, and there was a demand for relief from the city authorities. The jitney has relieved the short-haul condition to a very great extent. With the exception of the just completed but not used line, there are no more street railways now in that section than there were four years ago. There have been no extensions of tracks made by the municipal railroad or by the United Railways. Having particular reference to the Church Street line, it is proposed by the city to extend this line from its present terminus at 16th Street northerly to Market Street, and then down Market Street to Van Ness Avenue. That is to carry out the provisions of a bond issue that was voted for certain lines in 1913, and this is the only link remaining to be completed to consummate all the intention of that bond issue. That bond issue did not mention Market Street. It said a convenient route or connection between Church and Van Ness.

Mr. Haven: Market Street has been mentioned in a subsequent resolution of the Board of Supervisors.

The Witness: There are about six blocks on Market Street between the point of intersection of Church and Market and the point of intersection of Market and Van Ness Avenue. At the time the present suit was started and a restraining order issued, we were to put a crossing in at Van Ness Avenue and Market Streets, so that our Van Ness Avenue tracks extending southerly could cross the United Railway tracks and proceed along Market Street southwesterly outside the United Railway tracks to the northerly extension of Church Street. That is the last link of this bond issue project.

I am familiar with the project known as Twin Peaks Tunnel. That work is being done by the city, but an assessment district was formed and the property owners were all assessed. The

382 project was carried through at the request of the property owners and citizens, who petitioned the Board of Supervisors that they desired better transportation in this southwest portion of the city and came and asked the Board to form an assessment district for the construction of this project, which we could do under the charter. Thereupon the Supervisors tentatively formed an assessment district, and requested me to get up plans and specifications for the cost of this project. That was in 1912.

Mr. Lull: The scheme is that the property is assessed, and if property owners desire to pay their assessment in ten annual installments they may sign an agreement to pay the assessment in ten annual installments, or they may pay it in full; in case they pay in ten annual installments, of course there is a defficiency in the fund when we come to pay the contractors; that is taken care of in this way: a certificate is issued to the contractor stating that the city owes the amount of money as to which there is a deficiency, and as fast as that money comes into the assessment fund, these certificates are taken up and redeemed. The certificates constitute a lien upon the fund and the contractor can use them and sell them as bonds. They are practically the same as what we call in this State assessment bonds.

The Witness: The plans for the tunnel were made in 1913, and the contract awarded November, 1914. The contract has been under way now nearly two years, and the contract price amounts to about $3,300,000 for the cost of the work. The cost of acquiring land and rights of way amounted to very nearly $600,000. A strip at the southwest end of Market Street 1,900 feet long by 90 feet wide was acquired for tunnel purposes, and that was through the thickly settled Eureka Valley and cost a lot of money. The rights of way were granted practically free. I had hoped that the tunnel would be bored through by the first of June, but I believe from the progress the contractors are making it will be finished the first of April, 1917.

The total cost of the entire project will aggregate about $4,000,000, of which 85 per cent of the assessment was paid by the property owners surrounding the portal of the tunnel and only 15 per cent paid by the assessment district stretching down Market Street about as far as Fifth.

It is the hope to give to the people who paid the assessment and put up their money to get service, a rapid transit electric street-railway service through the tunnel as soon as it is completed. It is proposed that the cars after coming out of the easterly portal of Twin Peaks Tunnel shall go down Market Street. That is the only way at the present time of getting to the center of the city with the present amount of traffic. Of course, when the business expands and a large population exists out in this section of the country, possibly 150,000, then cars cannot be taken on the surface down Market

383 Street, but they will have to be taken either depressed or elevated, but at the present time such a construction would not be justifiable. In my opinion, the present surface road

on Market Street is the only relief these people can get in the way of service.

I am familiar with the service that is now being rendered to the territory in San Francisco west of the Twin Peaks Tunnel. Taking the mileage and the heavy grades that have to be overcome, and the tortuous route, the service is fairly adequate, so far as surface service can be. The time is rather long for the distance traversed. It takes from Victoria Street on Ocean Avenue near Ingleside via 19th Avenue down to Golden Gate Park, then along Lincoln Way, easterly on the southerly side of Golden Gate Park and down streets running east to Market Street and down Market to the Ferry, about 50 minutes. From the same points through the Twin Peaks Tunnel, I estimate the time in passing through the tunnel—12,000 feet—will be about 6 minutes, and the time going down Market Street as far as Fourth will not be over 16 minutes, so that would make the time from Fourth Street to the southwesterly portal not over 22 minutes. I would have to add to that about 2 minutes from the southwest portal down to Sloat Boulevard, making all together 24 minutes. I think it takes 6 minutes from Fourth and Market Street to the Ferry. Deducting this would make the time by the present route to Fourth and Market Streets 44 minutes as against 24 minutes through the tunnel. I fix Fourth and Market Streets because that is a fair comparison, because the center of population that will traverse this tunnel will commence from about Fourth and Market; it would not be fair to use the Ferry as the reference point. The time from Fourth and Market Street, taking that as the center of the business of the city, through the tunnel will be at least 20 minutes less than the time now taken by the existing line, if not more. Of course, one is bound to remember that going through a tunnel you can go at a very high rate of speed because the grades are easy and there are no obstructions, whereas if you are going on the surface of the streets you are required to stop at every crossing and you cannot make a high rate of speed.

With reference to the demands that were made by residents of this portion of the city for the construction of the tunnel and the improvement in street-car service, I know that they have been very insistent with the Supervisors and municipal administration, and that they were absolutely compelled to proceed with this project and give the city the service and opportunity for development and growth which it needs. At the present time people are taken from the Ferry and to points within twelve miles on the other side of the Bay in 35 minutes; and from the same point to points in the city within 5 miles, it takes 50 minutes. It is the general feeling of the citizens of San Francisco that our local transportation conditions must be improved, for the city to get its proper rate of growth. During the last five years our average rate of growth in San Francisco has been about 3 per cent a year. The trans-bay communities have been growing at the rate of about 7 per cent per year.

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The Court: I know, naturally, as one observing the climate about here, it would seem that the nearer you get to the sea the chillier the atmosphere; that might have a very material bearing upon the

question of the selection of a permanent home for a man, might it not?

The Witness: I think it is a matter of choice a good deal, whether a person likes good fog occasionally, or to be bathed in sunshine.

The Court: Of course, the man who has lived here for a long time, and I speak of mankind generally, because it is true of the opposite sex, they love fog and they love the gray days; but the man who comes from a sunny climate would probably like a climate such as San Rafael or Ross, for a time at least.

Mr. Cannon: I think your Honor is perfectly correct, and we are willing to take it as a declaration of testimony.

The Witness: I have studied the question and problem of municipal street-railway transportation. There is no doubt in my mind that adequate transportation service is an essential element to the growth of a city.

I am familiar with the loops on Market Street at the Ferry where the cars make the turn. It would be quite possible to relieve any future congestion by means other than now existing—by some rearrangement a third service loop could be made. About three years ago I made studies for elevating all the tracks in front of the Ferry by which a much greater service could be had down there at present.

I think that there is the greatest concentration of traffic at the foot of Market Street—greater, perhaps, than in any other city that I know of in the United States at one particular point. The means I suggested for overcoming that was to elevate all the surface tracks. They could come up Market Street a quarter of a mile, make an incline, and take all the tracks and elevate them on an incline and have loading stations on an upper floor. That has been done in Philadelphia. The Brooklyn Bridge traffic is handled in a way very much similar, but Philadelphia is very similar to what we contemplated doing here.

Q. Isn't there more congestion of traffic at Brooklyn Bridge than at the foot of Market Street;

The Witness: There are more leads, different leads, toward Brooklyn Bridge. Brooklyn Bridge carries more people than our ferries carry, but there are more leads, more ways to approach them than there are at our Ferry.

The Court: Is there enough space to make another loop down there?

The Witness: Yes, you could readjust the present loop and squeeze in another loop there on the surface."

Cross-examination:

"A third loop could be constructed at the Ferry by readjusting the existing curbs and so on; there have been more difficult things
385 than that done. It would require a readjustment of the present tracks. We would have to occupy more of the throat of Market Street than with the present car tracks. In our readjustment of the tracks we would have to throw the outer tracks closer to the curb. We might have to interfere with the sidewalk lines. We

have made about fourteen separate plans for handling that proposition down there in various ways, by various readjustments and loops and so on, because with the growth of traffic and so on the present conditions have to be modified.

With the growth of the City and the transbay communities the congestion will increase rather than diminish. That is why I made these plans three years ago for the relieving of the congestion. While I made fourteen different plans none was adopted. There ar several interests that have to be conciliated before any plan could be agreed to. The Harbor Commission has control of the Water Front. Then you have architects and artists who do not like elevant tracks. Then there is the teaming element, the draymen and merchants. Five or six elements have to be conciliated. Generally, in all our public enterprises, we have a good deal of discussion before we arrive at a solution of the problem, but we finally solve it. When we have conciliated all of the elements of which I have spoken, we do not go ahead without regard to the street railway properties, we are rather tender toward them. If we made another loop we would take care of the teaming underneath in a tube, make an incline underneath and pass the teams underneath. To make a third loop feasible we would have to dig a tunnel and put the teams down through the tunnel.

The Court: In New Jersey they did just the reverse of it; Newark was building a system whereby the trolleys came in under the ground; I think it is Market Street there, too; that is a very rapidly growing city; they were working on that last year. Your suggestion is here, to put the teaming underneath and leave the surface occupied by the lines.

The Witness: That would be one way to dispose of it, the easiest way would be to carry them overhead, but then the architects and artists come in and say you are spoiling the beauty of the Ferry Building by having an elevated structure. There is no public project which could be done in San Francisco without difficulty; this particular project would be difficult but not insurmountable.

The Belt Line Railroad runs between the outer loop and the sidewalk, in front of the Ferry Building. I could not say, offhand, how much space there is between the track of the Belt Line Railroad and the track of the outer loop, but I would say, possibly, about 12 to 15 feet. Offhand, I would say about that much.

There is not room for the tracks of a third loop to go around there, with the present tracks remaining where they are. Anyone of the schemes I have in mind would involve a remodeling of the location of those tracks, which is liable to be done any time at a month's notice from the Harbor Commission. The State Harbor Commis-
386 sion has jurisdiction over that; they may serve notice on you or us at any time, and you will have to move when they tell you to move. As the loops stand now, the car which is operated on the outer track cannot use the inner loop at all. As matters stand, you cannot put the cars from the outer track on the inner loop. You can put the cars from the inner loop on the outer track, and that is done by some of the lines operated down there. The matter of pro-

viding for operating a car from the outer track on the inner loop would only be a matter of providing switches and cross-overs."

A recess was here taken until Thursday, August 24, 1916, at 10 A. M.

Thursday, August 24, 1916, 10 A. M.

"The Witness: If a third loop should be constructed it would make the other two loops more difficult of access to passengers. It would not make the inner loop inaccessible, it would render it materially less accessible than it is now. This is a problem confronting us from an engineering standpoint.

Whatever scheme might be adopted for accommodating more care at the Embarcadero, would, relatively speaking, not involve a very large expense. In dollars and cents it would not be a large amount of money; it might go into thousands of dollars, but not very far into the thousands. It would not run into hundreds of thousands.

The first Geary Street car was run on December 28, 1912. Cars were then running along Geary Street, from Kearny to the Park, out Geary to Tenth Avenue, and then on Tenth Avenue to the Park, and then also on Geary to 33rd Avenue and the ocean. I believe that the ocean line and the Park line were started at the same time; they then only came down to Kearny, or to Kearny and Market streets. The following June, the first cars started to run from Kearny and Market to the Ferry; that would be June, 1913.

In June 1913 the 'A' and 'B' Geary Street lines, running to the Park and to the Ocean, were started down to the Ferry; that was subsequent to the construction of the connecting link between Kearny Street and the outer tracks on Market Street to near Sansome and Sutter Street. The latter tracks were constructed by the City to connect with the outer tracks already laid below Sansome Street. Subsequently, the City operated on Geary Street and on Market Street two other lines, designated as the 'C' and 'D' lines. The 'C' line was started February 13, 1915. The 'D' line started to run in August, 1914. The route of the 'D' line was out Geary to Van Ness Avenue, then along Union and Chestnut Streets, down to the Exposition and back part way by a different route, making a loop into Van Ness Avenue. The 'C' line ran out Geary Street to Second Avenue, Northerly on Second Avenue to California Street, and Westerly on California Street to 33rd Avenue. The 'C' and 'D' lines were a part of
387 the construction under the $3,500,000 Bond Issue that I mentioned in my direct testimony.

The ownership of 42.78 miles of single track would mean that it now possesses just half of that of double track railroad. All of the City lines are double track, so that the City has, in actual mileage, approximately 21 and a fraction miles of railway.

Mr. Cannon: The point just brought out, with respect to the Municipal tracks, applies in part to our tracks as well, as I understand it. I think the 278 miles mentioned in our bill includes some single track, but on most of the lines there is double track, so that there would be that difference.

The Witness: The line on 19th Avenue, which I mentioned yes-

terday, and the other line which serves Ingleside Terrace and that territory out there, do not run into that section for the purpose of serving that territory alone; they serve territory all along their route. The lines which I spoke of yesterday were the 19th Avenue line connected with the 20th avenue line, and another line running down to the Ocean joining at Ocean Avenue and coming up by Ingleside. A person going down to Ingleside could take either one of the lines. Those were the lines I spoke of yesterday when I gave the running time. I gave the 20th Avenue line as starting from Victoria Street, near the Easterly boundary of the Ingleside tract; this is the end of the line, but it comes down Ocean Avenue to 19th Avenue and then Northerly on 19th Avenue about a block and a half and then Westerly one block, and Northerly on 20th Avenue to Golden Gate Park and Lincoln Way, and then on Lincoln Way to Stanyan Street, and then on down. The other line starts from a point farther west; it goes to the Ocean and picks up traffic along the route, and goes along Ocean Avenue to Mission Street, thence Northerly on Mission Street down to the water front. It is not particularly well built up along the route of this line; there is no settlement yet on the Rancho de Laguna Merced.

The Southerly portion, south of Ocean Avenue, is fairly well built up, but there is a district just North that is just in process of developing; there are street contracts let for $225,000 for the Balboa Park and St. Francis Wood; that work is now under construction, opening up about 1400 lots, which will average possibly five people apiece; that would be about 7000 population that will be added to this section immediately on the completion of this development work, as soon as they move out there. This work is done under city specifications; contracts are now let aggregating a quarter of a million dollars.

Along the Southerly side, clear over to the Mission Road is fairly well built up; a good many people are living there. Those people are all served by this line. All along the line to the Mission Road is well built up. It is thickly populated, the settlement follows transportation; the district must be served by those lines.

Along the line of Twentieth Avenue it is pretty well settled in zones. The Parkside section, at the junction of T street, is
388 pretty well settled; then there is a belt northerly for about six or eight or ten blocks where there is very little settlement until you get further north. Then when you get within a few blocks of Lincoln Way it is settled. Along Lincoln Way is very densely settled. So this line is what you might call a local service. The line through Twin Peaks would help those people; by a connection from the portal of the tunnel going westerly it will make a very short ride to Parkside; it will help the whole section. It would help those parts that were spoken of yesterday. Forest Hill, St. Francis Wood and Ingleside Terrace. Those are the main tracts where there has been any building upon at the present time to any extent. They are the main sections that would be affected by the road through Twin Peaks at the present time; Parkside would be materially helped, but you would have to have a branch. The present population of Parkside, I

suppose, is about 1500 people. I should say that there are approximately 40 houses with an average of five people, or about 200 people in Forest Hill. In St. Francis Wood, I think there are about 20 houses, with about the same average, of 100 people. The present population of St. Francis Wood, Forest Hill and Ingleside Terrace is less than 1000, so that the population of all four of those tracts at the present time would be less than 2500.

The Twin Peaks Tunnel project was not for the purpose of supplying transportation for 2000 people, it was for the purpose of supplying transportation for 150,000, when they get there, and they will get there, there is not doubt about it. That isn't an opinion; they are going to be there. The motive for this project is to give service, proper transportation service, to the people residing in this district in the present and in the future. When the tunnel is completed it will serve the 2000 people that are there, and when the other work is done and the improvements are ready for the people to come in it will serve the other population also. You can't contemplate a project of this kind without looking into the future. As the expected growth takes place, the number of cars necessary to accommodate these people will undoubtedly be increasing through the tunnel and down town; so that, with the expectation of 150,000 people out there, it will require quite a rapid service and a large number of cars. It would require extensive equipment. The project of building tracks outside of the center tracks would accommodate the population for the immediate future, for possibly four or five or six or seven years, but after that time those tracks would be inadequate to take care of the service. It will be impossible to carry the dense population that is going to be out there in ten years from now by any surface tracks; the tracks will have to be elevated. It is my idea that these tracks about to be built will be just a stage in the development program of the city, not a final solution of the transportation problem; I would call it better than a makeshift,—it is a temporary solution.

There are already tracks right at the easterly portal of the Twin Peaks Tunnel.

389 The cars operated on all the Municipal lines are exactly the same gage as those of the United Railroads; they can run on the same tracks; there would be no physical obstacle to running the Municipal cars through the Twin Peaks Tunnel and down Market Street on the center tracks, but it would not be desirable. There would be no engineering difficulty. The question is the rate of speed. The happiest solution of the problem would be if we could arrange with the United Railroads to give them the outer tracks and have the City take the center tracks. My idea has been from the study I have given the matter that the best temporary arrangement would be for the express cars to go on the center tracks and for the locals to go on the outer tracks. My present idea is to run express cars on the outer tracks from Valencia Street to 17th Street. They would not be exactly express cars, but would not solicit very much local business; our cars would be practically through cars to this region beyond the tunnel. By through cars, I mean they would go through with very few stops; that is between 17th and Castro down

to Valencia, there would be stops at certain places and no intermediate stops. So, that, if, for instance, an inbound United Railroads car serving the people in this particular territory should stop, at Noe, Sanchez, Church, Dolores or Guerrero, the city car would go right along and pass by that car without stopping. Passengers getting on or off the United Railroads cars at this stopping place where the City cars did not stop, would have to wait until the City car had passed; they would have to look out for the Municipal cars as they have to look out for them now; the service out there, with this system, will be much less aggravated than the service at the Ferry.

From Valencia Street down town we contemplate a relatively slower speed; stops have not been contemplated there, but the presumption is they would stop at every block down through that section. No schedule has been made yet."

Redirect examination:

"The contemplated outer express service is merely tentative, the City has no fixed policy about it at all yet."

THOMAS A. CASHIN, a witness for the defendants, having been duly sworn, testified as follows:

"I am the Superintendent of the Municipal Railways; I am familiar with the traffic regulations as to the schedule maintained by the Municipal cars on lower Market Street. On inbound cars, from the Palace Hotel to the Embarcadero, and on outbound cars from the Embarcadero to Montgomery Street, we have, through an arrangement with the United Railroads, a series of stop marks. The stop mark consists of a marble block or cast iron plate inserted in the pavement; the cars on the outer track, both those of the
390 United Railroads and the Municipal Railroad stop eight feet ahead; that is, the front end of the car stops eight feet ahead of the car on the inner tracks, so that the platform of the car on the inner track will be clear of the platform of the car on the outer track. At the Palace Hotel an inbound car on the outer track stops 15 feet ahead of the car on the inner track. We have a general bulletin for the motormen stating that they must not in any case pass a car on the inner track when it is stopped and taking on passengers, except, of course, during a blockade, when it is not taking on passengers. I have had occasion to observe the operation of cars on lower Market Street, and firmly believe that these regulations are lived up to by our motormen. There have been infringements and infractions of the rules, but to very little extent. I have had occasion to observe whether or not cars on the inner tracks on lower Market Street are blanketed by cars on the outer track. I do not think that we do, as a rule, blanket any cars on the inner track. I have observed the condition with regard to congestion of cars at the Embarcadero, the cars may be held up there 25 to 35 seconds; that means, of course, that on a short headway there would be a number of cars lined up for a block or so temporarily for 25 or 30 seconds. This lining up of cars is of very short duration as a rule."

T-I-FITZPATRICK

Cross-examination:

"At times, during a blockade, I have seen two lines of cars one on the outer track and the other on the inner track, lined up back of the Embarcadero for two or three blocks. I can't say that I have seen them recently for four blocks. I have seen them for a couple of blocks temporarily; I would not say that that was common, but it does happen. In such cases, cars, if they are lined up to get around the loop, have to wait; they have to wait for the signal at the traffic point at the Embarcadero."

The witness was here shown a photograph, taken September 30, 1915, and marked "Plaintiff's Exhibit No. 11," and with respect thereto said:

"That was during the Exposition period; I have not seen that condition, it probably was a blockade of some kind; I have seen nothing like that."

The witness was here shown another photograph, taken in September, 1915, and marked "Plaintiff's Exhibit No. 13," and with respect thereto said:

"I have on one or two occasions seen something like that."

391 The witness was here shown another photograph marked "Plaintiff's Exhibit No. 12," and with respect thereto said:

"I have not seen anything like that, the power must have been off, or something of that kind."

The witness was here shown another photograph marked "Plaintiff's Exhibit No. 10," looking down on the street, and with respect thereto said:

"I have, during a blockade of some sort, seen that condition, but not to my knowledge except during a blockade. I do not think that condition obtains any day during the rush hours, there is quite a freedom of movement down there at the present time."

The witness was here shown a photograph marked "Plaintiff's Exhibit No. 18," being a representation of the safety station at Montgomery Street, and with respect thereto said:

"I have observed such a condition. I note in that that the regulations are being observed by the motorman on the car behind the one stopped, that he has stopped probably 10 feet behind, so that people can cross to the United Railroads car. I observe also that the United Railroads car has not stopped at its proper mark."

It was here admitted that said photograph was taken on October 5, 1915. The photograph was here offered and received in evidence and is as follows:

(Here follows photograph marked page 391*a*.)

392 "With respect to the photographs hereinabove mentioned, designated as Plaintiff's Exhibits Nos. 11, 12 and 13, I have seen the conditions shown by those photographs during blockades, but very seldom."

The three photographs were here offered and received in evidence, the one designated as "Plaintiff's Exhibit No. 11," is as follows:

(Here insert.)

(Here follows photograph marked page 392*a*.)

393 The one designated as "Plaintiff's Exhibit No. 12," is as follows:

(Here insert.)

and the one designated as "Plaintiff's Exhibit No. 13," is as follows:

(Here insert.)

(Here follow photographs marked pages 393*a* and 393*b*.)

LEY
RIA

Market St. Bet. Stewart & Spear Sts. Looking West - 9-30-15 5.10 P.M.

Market & Battery Sts. Looking East. 9-29-1915 - 4.55 P.M.

394 "The witness: There has been no substantial change in the headway on the United Railroads cars between last year and the present year. The headway on all of the municipal lines remains practically the same except on the "D" line. There is now a difference of over 20 municipal cars per hour passing around the loop.

Where there are four tracks the distance between the curb and the outer track is 18 feet, 6 inches. An ordinary vehicle takes up from 4½ feet to 5 feet; an automobile takes up a little over 5 feet."

Witness was here shown a photograph marked "Plaintiff's Exhibit No. 16," and with respect thereto said:

"I could not say that I have seen the condition shown by that photograph. I do not think that represents the condition that usually happens according to my experience. The picture shows a condition not in accordance with the rule, and the rule is usually obeyed."

In respect to photograph marked "Plaintiff's Exhibit No. 14," shown to him, the witness stated:

"Once in a while during a temporary blockade of some kind I have seen conditions such as are shown by this picture when the city cars are outside of the United Railroads cars."

The photograph referred to was offered and received in evidence and is as follows:

(Here insert.)

(Here follows photograph marked p. 394*a*.)

395 "The Witness (referring to the photograph last mentioned): The first two cars to the left of the picture appear to be municipal cars, I could not tell as to the rest, they may be United Railroads Sutter Street cars.

Where a municipal car and a United Railroads car approach the stopping place together, the regulation is that the municipal car shall stop eight feet in advance of the car on the inner track. If the United Railroads car is moving, then the municipal car would come to its stopping place. If the United Railroads car is stopped, the regulation is that the municipal car shall not advance. If there are two United Railroads cars stopped, one behind the other, the regulation, except in a blockade, is that the municipal car should not advance until those cars move, particularly if anybody is boarding them. If three United Railroads cars were stopped, one behind the other, that would be a standing blockade, and the order in such case is that the municipal cars proceed. In such case the municipal car would proceed to its stopping place and pass the three cars that were stopped. Such condition, of three or more cars, I would consider a standing blockade, and the municipal cars passing them would not violate any regulation. If at Geary and Kearny Streets there should be a line of cars on the inner track during the rush hours, down to or beyond Montgomery, I would regard such condition as a standing blockade, and the municipal cars would be entitled to pass.

On all the United Railroads cars there is an entrance at the rear, the right-hand rear of the car is the point of entrance for passengers ordinarily. There is an exit both at the right-hand rear and the right-hand front. Under the regulation of which I have spoken, when a municipal car goes to its regular stopping place it covers the front exit of the United Railroads cars. Persons desiring to use such exit to get off the car must either stand between the two cars or advance eight feet to the front of the municipal car. If a person, under such circumstances were getting off the United Railroads car and either that car or the municipal car should start, the person would be standing between the two cars in a 22½ inch space. During the hours of greatest congestion, what I call the rush hours, at certain points on Market Street the United Railroads cars use the front for entrance as well as exit, and have conductors at front and rear to take fares. This condition commences at the safety station at Third and Kearny and Market, and I believe they have one at Powell, and probably one at Fourth, I am not sure. The United Railroads in order to accommodate the crowds, load at the front and rear of the car at certain points; so do we.

If the outer tracks were extended out Market Street and the regulation of which I have spoken should continue in force, municipal cars stopped pursuant to that regulation would cover the front entrance of the car on the inner track, with a clearance, of course, of 22½ inches. The only way persons under those circumstances could get into the front of the United Railroads cars would
396 be by going around in front of the municipal car and back eight feet. With the type of car we use it is necessary during

the rush hours to load the cars at the front and rear, in order to load them quickly and keep them moving. It is of great assistance in the rush hours. Under the regulation of which I have spoken, if the outer tracks were projected out Market Street the front loading place of the United Railroads cars would be covered by the city car.

I would consider the condition where three or more cars were backed up one behind the other a temporary blockade irrespective of what caused it."

Redirect examination:

"It would be possible to so arrange that cars on the inner and outer tracks would stop at points not opposite each other alternating one on the inner track and one on the outer track behind them. We could have any kind of a stop mark 50 or 100 feet apart; that could be done all the way from Kearny street to the Ferry."

Recross-examination:

"The alternate stops suggested would cause a slight delay of course; that delay would cause increased expense of operation to an extent; any delay will somewhat increase cost of operation."

Redirect examination:

"The only delay caused by these alternate stops would be that the car on the outer track would not pass passengers getting on the cars on the inner track and would be caused by waiting for passengers to go through. It would affect the outer track and not the inner one."

Recross-examination:

"If alternate stops were arranged, passengers desiring to board the car stopping back from the regular place where passengers board would have to board the car some distance down in the block. They would have to alight at the regular stopping place, wherever it might be."

N. A. ECKART, a witness for the defendants, having been first duly sworn, testified as follows:

"I am Assistant City Engineer of the City and County of San Francisco. As such I participated in the negotiations which have taken place between the City and County of San Francisco and the United Railroads with respect to a possible purchase or joint use of the tracks on Church and 16th Streets. I am familiar with
397 those negotiations. I have the correspondence here that passed between the city and the United Railroads in that regard."

The witness here produced a carbon copy of a letter addressed to Charles N. Black, Vice-President of the United Railroads.

The witness here produced a letter, of Charles N. Black dated December 10, 1910, replying to the foregoing letter.

"The Witness: Subsequent to the receipt of Mr. Black's letter I received from the Engineer of the United Railroads an inventory and estimate of the value of the property involved and after several conferences with him we agreed upon the physical value of the property, in accordance with the valuation shown on this photostat copy of the actual agreed value prepared by the Engineering Department of the United Railroads in accordance with figures given to it by their engineers and our office. The engineers of the United Railroads and of the city agreed upon the valuation of the property described.

Following the receipt of this photostat copy, our office addressed a letter to Mr. Lilienthal, the President of the United Railroads."

Witness here produced a letter and identified it as the copy of the letter so addressed to Mr. Lilienthal.

The witness here produced a letter from Mr. Lilienthal, which he stated was in answer to the preceding letter, and further testified:

"Following the receipt of this letter the Public Utilities Committee of the Board of Supervisors requested Mr. Lilienthal and other representatives of the United Railroads to appear before the Committee and take the matter up and see if some agreement could not be reached. Mr. Lilienthal appeared before the Committee. There was some other matter mentioned in the correspondence but the direct request was for a valuation and the purchase of a half interest in those tracks on Church Street between Market and 16th. Mr. Lilienthal refused to sell to the city a half interest in those tracks unless certain other conditions were agreed to. Those conditions were not agreed to by the city. They were that the city should agree to interchange transfers with the United Railroads at Market Street on the basis of 60% to the United Railroads and 40% to the city, and also that the city pay to the United Railroads a certain definite sum for running over the tracks from Potrero Avenue to Church Street. The city had agreed to make the lat-
398 ter payment and also agreed to pay for the use of the 16th Street tracks to and from Church Street and the car house. No agreement was made because certain of the conditions proposed by Mr. Lilienthal were not satisfactory to the city, and the United Railroads refused to sell a half interest in the tracks on Church Street between Market and 16th Streets unless those conditions were agreed to.

I am familiar with the passage of the order by the Board of Supervisors ordering the construction of tracks on Market Street. That was subsequent to the negotiations which I have mentioned and the refusal to agree upon the joint valuation."

The correspondence, including original letter to Charles N. Black, his reply of December 10th, photostat copy of the agreed valuation of the properties mentioned in the correspondence, the letter to Mr.

Lilienthal and his reply thereto were here offered and received in evidence.

The letter to Mr. Black reads as follows:

"City and County of San Francisco,

Department of Public Works,

Bureau of Engineering,

Room 724, City Hall.

December 9, 1915.

Mr. Chas. N. Black, Vice-President and General Manager, United Railroads of San Francisco.

DEAR SIR: Under instructions from the Board of Supervisors we are proceeding with the construction of a street railway on Church Street from Market to 30th Streets. A part of the route traversed is over the tracks of your Company between 16th and Market Streets. The exact manner in which this Church Street Railroad will be connected to other tracks of the Municipal Railways has not been determined and is the subject of a separate letter I am to-day addressing to the President of your Company. In any event, the City will desire to acquire a half interest in the tracks of the United Railroads on Church Street between 16th and Market Streets or between 16th and Duboce, and I request that you have prepared and submit to me an inventory and estimate of the value of your roadbed on this street.

I am in doubt as to the best manner of arranging for the supply of electric current to our cars but am inclined to believe that a separate trolley wire for the Municipal cars, suspended, how-
399 ever, from the poles and span wires of your Company is preferable. Will you therefore also have prepared inventories and estimates of your poles and span wires on Church Street.

In asking for this information it is my understanding that neither this request nor your compliance with it is to be considered as an acknowledgement on the part of the City or yourselves of any rights which either the City or your Company may have in connection with the Market Street controversy, which is to be considered as entirely separate therefrom.

Yours truly,

M. M. O'SHAUGHNESSY,
City Engineer.

T. W. R./A. O."

Mr. Black's reply to the foregoing letter reads as follows:

"United Railroads of San Francisco,

58 Sutter Street,

San Francisco, Cal.

Chas. N. Black, Vice-President & General Manager.

December 10, 1915.

Mr. M. M. O'Shaughnessy, City Engineer, City and County of San Francisco, San Francisco, California.

DEAR SIR: I am in receipt of your favor of the 9th inst., in reference to the City acquiring a half interest in the tracks of this Company on Church Street, between 16th and Market Sts., or between 16th Street and Duboce Avenue.

I will be very glad to prepare and submit to you an inventory and estimate of the value of our property as requested.

Yours truly,

CHAS. N. BLACK,
Vice-President and General Manager.

C. N. B./M."

The photostat copy of the agreed valuation above mentioned is as follows:

Material.

Material.	Quantity.	Unit price.	Reproduction cost.	Scrap value.	Depreciable value.	Depreciation. Per cent.	Depreciation. Value.	Present value.
Girder Groove-Rail—Lorain 106-1-2-62′ lengths	59.432 tons	$51.00	$3,031.03	$416.02	$2,615.01	12½	$326.88	$2,704.15
Girder Guard Rail—Lorain—119#	.227 "	61.00	13.85	1.59	12.26	25	3.06	10.79
Girder Guard Rail—98#....	.167 "	61.00	10.19	1.17	9.02	25	2.26	7.93
Split Redwood Ties 6″ x 8″ x 8′	948	.56	530.88	.....	530.88	20	106.17	424.72
Tie Rods—⅞″ Round-Spaced 10″	190	.28	53.20	5.00	48.20	20	9.64	43.56
Cross Bonds—¾″ x 5′ x 4/0	2	3.40	6.80	4.42	2.38	12½	.30	6.50
Concealed Joint Bonds (4 per joint) ⅞″ x 10′ x 4/0	256	.51	130.56	32.64	97.92	12½	12.24	118.32
34″ Continuous Joint Plates 12 Holes with bolts (In Pairs)	62	5.95	368.90	118.05	250.85	20	50.17	318.73
Channel Joint Combination Plates (Prs.)	2	10.00	20.00	2.00	16.00	20	3.60	16.40
Bolts for Channel Plates...	24	.05	1.20	.....	1.20	20	.24	.96
401								
Spikes—9/16″ x 5½″—4 per tie	10.54 kegs	4.10 keg	43.21	.....	43.21	20	8.64	34.57
Basalt Block Headers (New) 3 to ft. on each side of rail 21,101		.06	1,266.06	.....	1,266.06	20	253.21	1,012.86
Block Paving, 15th St. Crossing	255 sq. ft.	.35	89.25	.....	89.25	50	44.62	44.63
Asphalt Pavement 12,400	sq. ft.	.09	1,116.00	.....	1,116.00	20	223.20	892.80
Cement—Total Sacks 1,855		.55	1,020.25	.....	1,020.25	20	204.05	816.20

Appraisecents Church Street-Market Street to Sixteenth Street, 1896 Ft. Single Track.—Continued.

Material.	Quantity.	Unit price.	Reproduction cost.	Scrap value.	Depreciable value.	Depreciation. Per cent.	Depreciation. Value.	Present value.
Rock (for ballast) Cu. Yds.	619	1.55	959.45	719.59	239.86	20	47.97	911.48
Rock (for concrete) Cu. Yds.	389	1.55	602.95	90.44	512.51	20	102.50	500.45
Sand for concrete, grout & Cushion—Cu. Yds.	275	.60	165.00	.....	165.00	20	33.00	132.00
Water for concrete	464 Bbls.	.11	51.04	.....	51.04	20	10.21	40.83
Office Expense in connection with material			100.00	.....	100.00	20	20.00	80.00
Totals			$9,670.82	$1,390.92	$8,186.90		$1,461.95	$8,117.87

402

Labor.

Excavating 19,000 sq. ft.:								
Pavement	19,078 sq. ft.	.03	572.34	.....	572.34	20	114.47	457.87
Earth	763 cu. yds.	.50	381.50	190.75	190.75	20	38.15	343.35
Laying Rail	1,896 Tr. ft.	.28	530.88	.....	530.88	12½	66.36	464.52
Depositing Sand & Ballast	1,896 ft.	.06	113.76)					
Flushing	1,896 ft.	.01	18.96)					
			132.72	99.54	33.18	20	6.64	126.08
Tamping, Lining & Surfacing	1,896 ft.	.30	568.80	.....	568.80	20	113.76	455.04
Bonding 64 Joints	64	2.20	140.80	.....	140.80	12½	17.60	123.20
Cross Bonds—2	2	.25	.50	.....	.50	12½	.06	.44
Concrete Stringers for headers	1,896 ft.	.07	132.72	.....	132.72	20	26.54	106.18
Concrete Base for Asphalt	1,896 ft.	.10	189.60	.....	189.60	20	37.92	151.68
							18	70
Header Paving	1,866 ft.	.18	335.88	.....	335.88	20	67.16	268.72
Cleaning Up: Removing Material	1,232 cu. yds.	.60	739.20	369.60	369.60	20	73.92	665.28

Material	1,252 cu. yds.						
Miscellaneous	4% of Labor	149.00	.....	149.00	20	29.80	119.20
General Construction Expense including Supt., Watchman & Timekeeper	5% of Labor	193.70	.....	193.70	20	38.74	154.96
Engineering, Surveying, etc.	7% of Labor	271.18	.....	271.18	12½	33.90	237.28
Totals		$4,338.82	$659.89	$3,678.93		$665.02	$3,673.80

Summary.

	Reproduction value.	Scrap value.	Depreciable value.	Depreciation.	Present. value.
Material	$9,579.82	$1,390.92	$8,188.90	$1,461.95	$8,117.87
Labor	4,338.82	659.89	3,678.93	665.02	3,673.80
	13,918.64	2,050.81	11,867.83	2,126.97	2)11,791.67
					5,895.84

March 21st, 1916.

Checked 3/21/16. N. A. Eckart. Unit prices, quantities are in accordance with agreed values by B. P. Legare of U. R. R. and N. A. Eckart.

404 The letter to Mr. Lilienthal reads as follows:

"City and County of San Francisco,
Department of Public Works,
Bureau of Engineering,
City Hall.

March 27, 1916.

Mr. Jesse W. Lilienthal, President, United Railroads, San Francisco.

DEAR SIR: On December 9, 1915, this office addressed a letter to your Mr. Chas. N. Black, Vice President and General Manager, stating that the City will desire to acquire a one-half interest in the tracks of the United Railroads between 16th and Market Streets, and requesting that your Company submit an inventory and estimate of the value of the roadbed on this street including also the poles and span wires.

In response to this letter an inventory was submitted and since which time this office has been able to agree with your Engineering Department on the value of the tracks involved. Will you therefore kindly submit, at your earliest convenience, on Wednesday if possible, a formal offer to sell to the City of San Francisco one-half interest in the tracks and poles of your Company on Church Street from Market to 16th Streets.

In the meantime this office makes the request that your Company permit the physical connection of the City's Church Street line with the tracks of your Company at 16th and Church Streets, and the installation of the crossover in your Church Street tracks south of Market Street, in order to permit the repaving of Church Street in the vicinity of 16th Street south, and the completion of the contract which the City has entered into for the track work on Church Street.

Relative to the connection of the Potrero Avenue tracks with your 16th Street tracks at 16th Street and Portrero Avenue, this matter can be delayed until the formal acceptance of your Company's offer relative to the City using your 16th Street tracks, from Potrero Avenue to Church Street, but I would request that the City be permitted to make this connection as soon as they may have indicated their intention of accepting your offer.

Yours truly,

M. M. O'SHAUGHNESSY,
City Engineer.

N. A. E./S."

His reply thereto reads as follows:

405 "United Railroads of San Francisco,
58 Sutter Street,
President's Office.

San Francisco, March 29, 1916.

Hon. M. M. O'Shaughnessy, City Engineer, San Francisco.

DEAR SIR: I have your letter of yesterday.

While I have every desire to cooperate with the city officials to arrive at a mutually satisfactory arrangment, I am advised by our Law Department that it would injuriously affect the interests of the Company if the desired offer were made and the desired permit were granted before there has been a formal acceptance by the City of the offer of the Company already made.

Yours very truly,

JESSE W. LILIENTHAL, *President.*"

J. W. E./A. C.

406 Cross-examination:

"There was no further correspondence upon the subject that I can recollect. The conference between Mr. Lilienthal and the Public Utilities Committee continued several days. I was present. I think Mr. William M. Abbott was present for the United Railroads, with Mr. Lilienthal. Mr. Black was in the East at the time, I think. One of the things that the city was asking in those negotiations was a transfer privilege from its Church Street cars to Market Street cars of the United Railroads. It desired this privilege pending the adjustment of the present controversy with reference to Market Street. Our Engineering Department inquired into the question of an equitable division of the fares in the event that a transfer system was adopted. Our Engineering office recommended a division of 60% to the United Railroads and 40% to the City. The City would not accept this basis of division; what we desired to do was to purchase a half interest over Church Street to Market and 16th Streets; that they refused to sell. They agreed on the value but did not agree to sell. An agreement was drawn by the Law Department of the United Railroads and submitted to the Public Utilities Committee and the City Engineer's office. It included the sale and different elements. We recommended the 60% and 40% arrangement as fair, and the agreement as drawn included that. But that was not part of the negotiations,—our desire was to purchase this half interest in these two blocks on Church Street from Market to 16th entirely separate from anything else involved. The United Railroads insisted that the other questions of exchange of transfers and so on should be jointly settled with the use of the track on 16th Street from Potrero to Church. The Public Utilities Committee refused to accept the division on the basis of 60% to United Railroads and

40% to the city, and insisted upon an equal division. We requested that the United Railroads permit us to make the connection at 16th and Church pending an agreement with the United Railroads to sell the half interest in those two blocks of track. The United Railroads refused to permit us to do so pending the settlement of all of these questions. They refused to do so in advance of the signing of an agreement."

Redirect examination:

"That agreement was to include a provision with respect to the division of transfer receipts. The Supervisors and the Public Utilities Committee would not consent to a division on the basis suggested by the United Railroads. We were unable to use those tracks on Church Street without providing some other connection with our car barn. The United Railroads refused to enter into this joint arrangement so as to permit us the use of the tracks unless the provision in regard to transfers was included in the same arrangement. They said they would stop any atetmpt to make a connection."

407 Recross-examination:

"The United Railroads made a statement that they would enter into a transfer arrangement upon the basis of 60% to them and 40% to the City. A copy of that proposal was furnished to the City Engineer's Office."

A letter addressed by Charles N. Black to Edward Wolfe, Chairman of the Public Utilities Committee of the Board of Supervisors, was here offered and received in evidence, and is as follows:

"United Railroads of San Francisco,

58 Sutter Street.

San Francisco, Cal., Feb 8th, 1916.

Mr. Edward I. Wolfe, Chairman, Public Utilities Committee, Board of Supervisors, San Francisco, Calif.

DEAR SIR: Complying with your request to place in writing the proposition submitted by this Company to the Public Utilities Committee of the last Board of Supervisors, with a view to furnishing transportation to the patrons of the proposed Municipal line on Church Street to the downtown section of the City, I take pleasure in submitting the following:

(1) Pending a settlement of the controversy over the joint use of tracks for a distance of over five city blocks, this Company will agree to exchange transfers at Church & Market Sts. between the cars of this Company operating on Market Street, between Church and the Embarcadero, and the Municipal cars operating over Church Street, on the basis of a division of the 5 ct. fare paid by passengers who

avail themselves of such transfers in the ratio of 60% to the United Railroads and 40% to the City.

This is equivalent to the City redeeming all transfers issued to passengers riding on its Church Street line, and which transfers are presented for transportation on the cars of this Company operating on Market Street toward the ferry, at the rate of 1 ct. each, while on the other hand this Company would not be called upon to redeem transfers issued to passengers on outbound Market Street cars who use such transfers for transportation over the Church Street line.

To make this clear it is necessary to consider the round trip which the average person would make. Starting from some point on Church Street, he would board a Municipal car, paying 5 cts.
408 for his transportation. He would receive a transfer which would be handed to one of our conductors on an inbound Market Street car. This transfer the City would redee mat 1 ct. In other words, the City would receive 3 cts. net from such passenger. On the other hand, when the passenger returns, he would board a United Railroads car and pay this Company 5 cts. The transfer which he would receive from our conductor would entitle him to ride south on Church Street. Accordingly, for the round trip this Company would receive a total of 6 cts., and the City a total of 4 cts.

(2) We were also requested by the Public Utilities Committee of the old Board to state upon what terms we would be willing to transfer with the Church Street line at Market and Church Sts., provided the City purchased the so-called Parkside System of this Company, which is located south of the Twin Peaks. Unless, however, the present Committee seriously considers taking this matter up, it would be premature for us to discuss the matter further, as many other transfer points are involved. But I will state, for the information of your Committee, that informally it was suggested that transfers be exchanged on an equal basis at Market and Church Sts., at the entrance of the tunnel, at Market, in the vicinity of 17th Street, at 20th Avenue and Lincoln Way, and at Ocean Avenue and Junipero Serra Boulevard.

As stated above, however, the discussion of this matter is academic, unless your Committee desires seriously to consider the purchase of the Parkside System.

Yours truly,

(Signed) CHAS. N. BLACK,

Vice-President & General Manager."

C. N. B./M.

409 "The Witness: I do not know whether this letter was formally referred to our Department, but it was considered by us. We made a report on it. This document dated March 27, 1916, is a copy of the report."

The report was here offered and received in evidence and is as follows:

"City and County of San Francisco,

Department of Public Works,

Bureau of Engineering,

City Hall.

March 27, 1916.

Public Utilities Committee, Board of Supervisors, San Francisco.

GENTLEMEN: The United Railroads, in response to a request of the Chairman of the Public Utilities Committee, submitted a letter setting forth the terms under which the United Railroads would agree to an interchange of transfers with the Church Street Line of the Municipal Railways and the Market Street lines of the United Railroads at Church and Market Streets, which, briefly stated, was on a 60 and 40 basis, that is, the United Railroads would receive 3 cents for each Municipal transfer and the City to receive 2 cents for each United Railroads transfer taken at this point.

Subsequently this office addressed a communication to the United Railroads, a copy of which is attached, requesting that the United Railroads include in its transfer offer terms under which the Municipal cars could be transferred between the Church Street tracks and the Municipal Carbarn over the 16th Street tracks of the United Railroads, in response to which, in a letter, a copy of which is attached, the United Railroads offered to permit the City to connect with the 16th Street tracks of the United Railroads at Potrero Avenue and 16th Street and to operate Municipal cars from Potrero Avenue to Church Street over the 16th Street line, for the sum of 20 cents a car mile, amounting to approximately 24 cents a trip.

The basis of 60 and 40 for the transfers at Church and Market Streets is eminently fair, the length of track on Church Street being almost exactly two-thirds of the length of track on Market Street from Church Street to the Ferry, whereas the ratio of mean passenger hauls would probably be somewhat in favor of the City.

The charge of 20 cents per car mile for Municipal cars operating from Potrero Avenue to Church Street over the 16th Street tracks of the United Railroads at first sight seems high, but the total amount involved will be only $4.80 per day, of which about $2.10
410 would represent the actual expense to the United Railroads in granting us the privilege, and $2.70 per day would represent the payment to the United Railroads for the privilege of using the tracks. Furthermore, both the transfer arrangements at Market Street and the use of the 16th Street tracks are temporary arrangements, pending the settlement of the Market Street controversy.

I therefore recommend that the terms offered by the United Railroads for interchange of transfers at Church and Market Streets and for the use of the 16th Street tracks between Potrero Avenue

and Church Street be accepted by the City as a temporary expedient pending the larger question of the determination of the City's rights to laying outer tracks on Market Street.

Respectfully,

M. M. O'SHAUGHNESSY,
City Engineer.

N. A. E./A. O.
Encl."

"The Public Utilities Committee of the Board of Supervisors refused to accept the recommendation in that report."

Redirect examination:

"The Superintendent of the Municipal Railways advised defendants upon the subject of the proper basis of division of transfer receipts. His opinion was that the Public Utilities Committee should insist on a 50-50 transfer division."

Counsel for the defendants here offered and there was received in evidence, a letter of Jesse W. Lilienthal, President of the United Railroads, directed to the Board of Supervisors of the City and County of San Francisco under date January 11, 1915; the letter reads as follows:

"United Railroads of San Francisco,

58 Sutter Street.

President's Office.

San Francisco, January 11, 1915.

To the Honorable the Board of Supervisors of the City and County of San Francisco.

DEAR SIRS: In acknowledging receipt of the resolution adopted by your Honorable Board last week, we beg to answer the questions contained in that resolution as follows:

First.

The present policy of the United Railroads in the matter
411 of the extension of existing lines would be to meet the conditions of the growth of the City were such a policy practicable. But unfortunately, by reason of the restrictions contained in the charter, it is impossible for any private corporation to finance the construction of any street railroads in any part of the city. These charter conditions may be briefly referred to as follows:

a. Minimum wage scale, $3.00 for eight hours, with time and a half for overtime.

b. Reversion of all physical property to the City at the end of the franchise period, which is limited to twenty-five years.

When to this condition is added the heavy tax burden, it makes an impossible financial proposition.

Second.

The answer to this question is largely covered by the answer to the first. It should be stated, however, that wherever the Company is operating existing lines it is prepared to add additional rolling stock as the traffic demands.

It cannot be denied that during the socalled 'rush hours' the cars are overcrowded, but it is not true that by simply increasing the number of cars this condition can be ameliorated. On those lines to which this criticism is particularly directed, the addition of cars would only tend to make a bad matter worse by reason of the fact that the capacity of the tracks in the downtown section, where the overcrowding is greatest, has already been reached, and adding cars would tend to decrease the schedule speed so much that the number of persons which we could carry by a given point within a given time would also be decreased.

This condition of overcrowding will be found in practically every city having a population exceeding 100,000. It is a problem confronting every street railroad operator, and no question in connection with city transportation has been given more careful study.

In New York City, for instance, the transportation problem prior to the construction of the subways was the most serious matter confronting the municipality. It was thought that when the subways were completed the problem would be solved, but, although they have been in operation for several years, the present conditions are fully as bad as they were prior to their construction, and during the rush hours the overcrowding of the subways, surface lines and elevated railroads are far in excess of anything San Francisco has ever experienced.

Extending the lines of this Company into the outlying districts or the reconstruction of any roadbed will in no way solve the problem of the rush hour congestion.

412 In this connection it seems proper to call attention to the fact that during the past five years the Company has constructed a total of 73.47 miles of single track, of which total 62.32 are within the corporate limits. Of these, 10.88 miles of single track were extensions and the balance reconstruction.

During this same period the City has constructed 31 miles of single track or about one-half of what this Company has constructed or reconstructed within the corporate limits.

Our total mileage within the City is 247.38 miles of single track, of which 159.79 miles have been constructed or reconstructed since April 18, 1906.

Since the organization of the Company in 1902, the Company has constructed or reconstructed a total of 192.98 miles. Indeed, with the exception of the cable railroads, there is very little track within the corporate limits which dates back of 1902, and what remains is principally in the outlying districts, where the travel is light.

It cannot, therefore, be said that there is need of much reconstruction or that any track is in a dangerous condition. On any

large street railway system it is necessary to continually make repairs to the pavement, especially on streets where the traffic is heavy. It is the policy of this Company to cooperate with the City officials in every way in the making of repairs and maintaining a proper roadbed. When consideration is given to the great disaster of April, 1906, it can safely be asserted that no street railroad has done more work in the maintenance of its property than this Company.

Third.

The answer to this question is largely contingent upon the attitude of the Railroad Commission. At the present time, however, the Company has ample rolling stock to take care of the present traffic.

We have recently built in our own shops a new car, now operating on the Market street line from the Ferry to 18th and Castro streets, in which we have introduced many improvements over any of the existing rolling stock in San Francisco. The two most important are the elimination of one step and the reduction in weight of over 15,000 pounds. As soon as we are thoroughly satisfied that all of the details of this new car are satisfactory we expect to adopt it as a standard for future rolling stock.

During the year 1915 we expect to spend at least $780,000 or an average of $65,000 per month on maintenance and reconstruction. At this rate, practically every foot of track operated electrically within the city limits will have been reconstructed by the end of
1916. Appropriations for this work are taken care of
413 partially as ordinary operating expenses and partially by requisitions approved by the Board of Directors upon the recommendation of the General Manager.

Fourth.

Generally speaking, the Company proceeds on these reconstruction plans in accordance with the requirements of the operation of the property. But it always endeavors to cooperate with the City departments, especially the Board of Works, in reconstructing its track and roadways, and is generally guided by the Board of Works as to the localities where repairs are most needed.

Fifth.

The operating statements for the calendar year ending December 31, 1914, have not been completed, and consequently in reply to this question it will be necessary for us to estimate the December expenditures. The figures for eleven months, however, are accurate and the totals given below will be accordingly very close.

During the calendar year, on additions and betterments to our rolling stock we expended, approximately, $45,000. On additions and betterments to track and roadway we expended, approximately, $250,000, in addition to $600,000 on maintenance.

This construction and reconstruction of track and roadway was in the following localities:

San Bruno avenue, Ocean Shore Railway to Oakdale.
Army street, York to Ocean Shore Railway.
Cutoff, between Army street and San Bruno avenue, over Ocean Shore right of way.
San Bruno avenue, Dwight street to Railroad avenue.
26th street, Mission to Bryant streets.
Mission street, Army street to Virginia ave.
Kentucky street, 4th street to Islais Creek.
Polk street, Lombard to North Point street.
Bryant street, 10th to 11th streets.
Bosworth street at Southern Pacific viaduct.
Ocean avenue, San Jose avenue to Harold avenue.
O'Farrell street, Van Ness avenue to Divisadero street.
Ellis street, Divisadero to Buchanan streets, and Octavia to Franklin streets.
10th street, Market to Howard streets.
Polk street, Hayes to Market streets.
3rd street, Market to Mission streets.
Euclid avenue, Parker avenue to Arguello Boulevard.
Richland avenue, Mission to Andover streets.
Geary street, 33rd to 38th avenues.
Peninsula avenue, San Mateo.
City Line, Mission Road to Daly City.
Mission Road, Daly City to Orange street.
Orange street, Daly City to Colma.
414 Colma, Market street to Holy Cross Cemetery.

The Company is prepared to appropriate whatever funds are necessary to carry on this reconstruction of its track and roadway as rapidly as is practicable.

We have been employing approximately 600 men continuously on this work and expect to continue at the same rate.

Sixth.

The recommendation of this Company in connection with providing a direct car line from the Sunset District to the Ferry is to change the routing of the present Ellis and Ocean line and Ellis and Ingleside line, known as Nos. 20 and 17, over Turk and Eddy Streets in place of Ellis and O'Farrell, as at the present time, thus eliminating the overlapping of this line with the Turk and Eddy line on Divisadero street, which is a continual source of danger. The Turk and Eddy line would then be routed over Ellis and O'Farrell streets direct to the Third and Townsend Depot, with which the Richmond District at the present time has no direct connection.

Seventh.

The United Railroads is financially able to meet all of its obligations to this community and will gladly do so. In fact, notwithstand-

ing the dullness of the times and the constantly increasing competition, the Company has seen its way to increase the wages of the employees, to insure their lives for the benefit of their families, irrespective of their physical condition and without cost to them; to establish a system by which any saving of costs by the reduction of accidents will inure to the benefit of the employees; and to make numerous loans to them to take or keep them out of the hands of loan sharks charging 10 per cent per month.

It is certainly not the policy of this Company to obstruct in any way the extension of the municipal lines. We believe that the City Engineer will bear us out in the statement that we have rendered every assistance in connection with furnishing specifications or information to his office, in connection with the construction of the City lines, both as to track and roadway and rolling stock, and this same policy will be pursued in the future. We have also furnished the City with our shop facilities to make repairs to their equipment and have only charged the City for such services at their actual cost.

It is the policy of this Company to concede to the City every request which it might make of the Company, but, just as your Honorable Board are trustees for the public, the directors of the Company are trustees for its creditors and stockholders and must obtain for every concession some reasonable equivalent. Approaching every negotiation, as we mean to do, in the right public
415 spirit, it ought to be possible for us to avoid all friction, and we shall certainly cooperate to that end.

Finally, we beg leave to say that the public is entitled to adequate transportation facilities, and, to the extent that private capital cannot or will not build the necessary extensions, it is not alone the right but the duty of the City to furnish same, and we would not, if we could, do anything to obstruct the fulfillment of that duty.

Trusting in this way to have furnished your Honorable Board with the desired information, we beg leave to remain,

Yours very respectfully,

UNITED RAILROADS OF SAN FRANCISCO,
By JESS W. LILIENTHAL, *President.*

J. W. L./A. C."

416 In connection with the foregoing, it was admitted that Mr. Lilienthal at the time of writing the letter was and still is President of the complainant.

In connection with the foregoing letter, counsel for the defendants offered and there was received in evidence Journal resolution No. 1600 of the Board of Supervisors entitled "Improvement of Street Railway Service," adopted January 4, 1915. Said resolution reads as follows:

"Improvement of Street Railway Service.

On Motion of Supervisor Gallagher.

J. R. No. 1600.

Whereas, The United Railroads, through its President, Jesse W. Liilienthal, has announced a desire to cooperate with this municipality in every effort to improve the street railway transportation service of San Francisco, and

Whereas, It is admitted by all persons, and evident from the numerous complaints made, as well as from the not only dangerous but exceedingly crowded condition of cars during so-called rush hours, that vast improvement is necessary by one or two methods, i. e., the recognition by the directorate of the United Railroads of their plain duty to a community that has been more than fair and generous in its treatment of that corporation, by extension of its lines to suffering outlying communities, by providing a sufficient number of cars for the comfortable transportation of its passengers, by reconstruction of many miles of roadbed, some of which is now badly in need of repair, and some of which it is dangerous for operation; or if the United Railroads is unable or unwilling to make these improvements, then by municipal ownership and operation of street car lines.

Resolved, That the Board of Supervisors, representing the citizens of San Francisco, accepts the statement of the President and Directors of the United Railroads as made in good faith, and is mindful of an apparent effort on the part of that corporation to make some improvements in service and track reconstruction; but is also aware of the fact that the improvement has been slight, and the track reconstruction (in most instances) has been done in places where it has been overdue for years.

This Board is further of the belief that the citizens of this community have ever been fair and liberal with any corporation that has dealt with it in a dutiful spirit, and that citizens are willing to be liberal with any corporation which perfoms its full duty to the city. Be it further.

Resolved, That this Board, in an effort to improve the service of the United Railroads, requests answers to the following questions, so that it may be better able to prescribe certain actions on
417 the part of that company for service betterment:

First. What is the present policy of the United Railroads in the matter of extensions of existing lines?

Second. What plans has it for the improvement of service in the Potrero district, the South San Francisco district, the Mission district, the Parkside district, the Sunset district, Ingleside and Sunnyside districts, south of Market district (Howard, Folsom, Bryant, Brannan, Fourth, Fifth, Sixth and Tenth streets), the water front district, the Haight and Ashbury district?

Third. What is its present financial condition, namely, as to providing more cars and how many?

What plans has it as to reconstruction of tracks and roadbed?

How are its appropriations made for such improvements?

Are they made by annual budget allowance or by actions of the Board of Directors at stated meetings on recommendations?

If allowances are made on recommendations at meeting, by whom are they recommended?

Fourth. Does the United Railroads proceed on these reconstruction plans according to its own ideas, or does the City departments determine and govern as to the most needful and where placed?

Fifth. The United Railroads will state how much was allowed during the year 1914 on purchase of new cars, on track reconstruction and where said reconstruction was done; it being the purpose of the Board to ascertain the amount of money expended by the corporation within the last year in iimprovements, and

Further. What funds can be provided for the immediate construction and reconstruction of pavements and street work which said United Railroads is obligated iin its franchises to construct, maintain and keep in repair?

Sixth. What will the United Railroads do to provide a direct carline from the Sunset district to the ferry? (Or, what are its recommendations on the subject?)

Seventh. If the United Railroads finds itself financially unable to meet with the call for improvement in the service in this community, why will it not adopt the policy of non-obstruction to the process of enlargement of municipal lines, it being the evident purpose of the citizenship to, in finding that the United Railroads cannot cope with the situation, provide their own service. By the above is meant that the policy of non-legal interference in the constructive policy in municipal owned railroads should be recognized by the United Railroads as an effort on the part of this Board of Supervisors to relieve a very pressing problem.

Be it further Resolved, That a reply is expected to these queries at the earliest date and upon receipt of same a copy is to be furnished each member of this Board and the Engineering Department.

418 And be it further Resolved, That upon receipt of this reply the Public Utilities Committee is directed to give earnest consideration to same, to the end that they may make proper recommendations to the Board on the general subject; and it is further suggested that the Public Utilities Committee consider the advisability of setting specific and stated dates upon which the only question to be considered will be the improvement of the street Railway transportation of this city.

Adopted January 4, 1915.

Ayes: Supervisors Bancroft, Deasy, Gallagher, Hayden, Hilmer, Hocks, Jennings, Kortick, McCarthy, McLeran, Murdock, Nelson, Payot, Power, Suhr, Vogelsang, Walsh—17."

419 Counsel for the defendants also offered and there was received in evidence Ordinance No. 3754 N. S., approved May

24, 1916. Said ordinance reduces the width of the sidewalks on Church Street from 15 feet to 10 feet, and reads as follows:

"Bill No. 4087. Ordinance No. 3754. (New Series.) Amending Ordinance No. 1061, entitled 'Regulating the width of Sidewalks,' approved December 18, 1903, by amending section thirty-three thereof.

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. Ordinance No. 1061, entitled 'Regulating the width of Sidewalks,' approved December 18, 1903, be and is hereby amended in accordance with the communication of the Board of Public Works, filed in this office May 11, 1916, by amending section thirty-three thereof to read as follows:

Section 33. The width of sidewalks on Church street between Market street and Sixteenth street shall be ten (10) feet.

The width of sidewalks on Church street between Sixteenth street and Thirtieth street shall be fifteen (15) feet.

Section 2. This Ordinance shall take effect and be in force from and after its passage.

Finally Passed—Board of Supervisors, San Francisco, May 22, 1916.

Ayes: Supervisors Brandon, Deasy, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLeran, Mulvihill, Nelson, Nolan, Power, Suhr, Walsh, Welch, Wolfe.

Absent: Supervisor Gallagher.

J. S. DUNNIGAN, *Clerk.*

Approved, San Francisco, May 24, 1916.

JAMES ROLPH, JR., *Mayor.*"

420 It was admitted by the defendants that no work had been done under the ordinance looking to the actual reduction of the width of the sidewalks.

It was here admitted by counsel for the complainant that the copy of Resolution No. 10138 N. S., attached to the answer of the defendants, was a true copy of said resolution.

Counsel for the defendants in connection with said resolution offered and there was received in evidence the affidavits of J. S. Wardell and J. S. Dunnigan, the latter being the Clerk of the Board of Supervisors of the City and County of San Francisco. In this connection it was admitted by counsel for the complainant that said J. S. Wardell, if present in court, would testify as set forth in his affidavit, and that Mr. Dunnigan, if present in court, would testify as set forth in his affidavit. The affidavit of said J. S. Wardell reads as follows:

"Affidavit of Publication.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. S. Wardell of the City and County, being duly sworn, deposes and says: That he is now, and at all the times hereinafter mentioned was, a citizen of the United States, over twenty-one years of age. That he is, and was during all the time embraced in the period of the publication herein mentioned, the Printer and Publisher of Daily Journal of Commerce. That the said Daily Journal of Commerce was, at all times mentioned in this affidavit, a newspaper of general circulation printed and published daily (Sundays excepted) in said City and County, and the newspaper designated by the Supervisors of said City and County as the Official Newspaper thereof.

That deponent, during all the time mentioned in this affidavit, has had, and still has, charge of all the advertisements in said newspaper.

That the "Notice Soliciting Offers" etc. a true copy of which is appended hereto and marked "A," was printed and published daily in said Daily Journal of Commerce newspaper for a period of 10 days commencing on the 13th day of May, 1913 and continuing
421 thereafter until and including the 23rd day of May, 1913, and that such publication was made on the following days, to-wit—May 13, 14, 15, 16, 17, 19, 20, 21, 22 & 23, 1913, and upon every day said newspaper was published during said period. That said publication was made in each and every issue and copy of said Daily Journal of Commerce newspaper, printed and circulated during said time.

J. S. WARDELL.

Subscribed and sworn to before me this 3rd day of October, 1913.

[SEAL.] MARTIN ARONSOHN,
Notary Public in and for the City and County of San Francisco, State of California."

"EXHIBIT 'A.'

"Notice Soliciting Offers for the Sale of Street Railways to the City and County.

Office of the Clerk of the Board of Supervisors, San Francisco.

May 12, 1913.

To the owner or owners of any street railroad or system of street railroads in the City and County of San Francisco:

You are hereby solicited and invited to submit to the Board of Supervisors of the City and County of San Francisco prior to the second day of June, 1913, an offer or offers in writing to sell to the said City

and County any street railway or system of street railways or any portion thereof, operated over or upon any street in the City and County, and that the Board of Supervisors will consider any and all such offers that may be submitted on the second day of June, 1913, at its regular meeting on said day.

This notice is given in compliance with the Charter of the City and County of San Francisco and of Resolution No. 10138 (New Series) adopted April 28, 1913, and your attention is called to said resolution for further particulars.

Dated, May 12, 1913.

J. S. DUNNIGAN, *Clerk.*"

The affidavit of said J. S. Dunnigan reads as follows:

422 *"Affidavit of Service of Notice.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

John S. Dunnigan, being duly sworn, says, that at the time herein mentioned he was the duly appointed, qualified and acting Clerk of the Board of Supervisors of the City and County of San Francisco:

That in obedience to the direction of Resolution No. 10138 (New Series), he caused a copy of the Notice hereto annexed, Marked 'A,' to be deposited in the United States Post Office at San Francisco, postage prepaid, on the fourteenth day of May, 1913:

That one copy of said Notice was so mailed addressed to the California Street Cable Railway Company; one copy of said Notice was so mailed and addressed to the Presidio and Ferries Railroad Company, and one copy of said Notice was so mailed, addressed to the United Railroads of San Francisco, at their respective places of business in the City and County of San Francisco.

J. S. DUNNIGAN,
Clerk Board of Supervisors.

Subscribed and Sworn to before me this 20th day of May, 1913.

L. J. WELCH,
Deputy County Clerk.

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Dated, May 12, 1913.

J. S. DUNNIGAN, *Clerk.*"

423 It was admitted by counsel for the defendants that said resolution No. 10138 (New Series) was passed and the notice mentioned in the foregoing affidavits was sent out as a part of the proceedings on a proposed bond issue looking for the construction of various lines, including a connection between the Van Ness Avenue line of the city and the proposed Church Street line by some convenient route, that the resolution and notice have reference to that line, but no reference to any proceeding involving the construction of a line on Market Street from 17th to Church, or from Van Ness Avenue to Kearny. It was further admitted that there had been no proceedings taken for any road from Twin Peaks Tunnel down Market Street; no bond issue for that, and that the resolution and notice above mentioned did not refer to Market Street at all, but only to a connection between Van Ness Avenue and the Church Street line by some convenient route.

The defendants here rested.

WILLIAM VON PUHL, a witness for the plaintiff called in rebuttal, testified as follows:

"The receipts on the Twentieth Avenue line and the other line which connects with the Mission Road,—the one running out to the Ocean and out the Boulevard and along Balboa Park and the Mission,—based on the travel from Victoria Street to Lincoln Way on line 17, or from Balboa Park to the Ocean on line 12, are not sufficient to pay the wages of the conductors and motormen."

Cross-examination:

"I separate that particular portion from the rest of the trip in making my computation. The same conductors and motormen make the whole trip from the Ferry. The statement with reference to the receipts between the points I have mentioned is based upon a count of the passengers between those points."

424 CHARLES L. AYRES, a witness for the complainant in rebuttal, having been first duly sworn, testified as follows:

"I am account inspector of the United Railroads. I have been engaged in the railroad business since April 1878. At that time I was a conductor on the Hayes Street horse cars. I worked as a conductor on that line for nine months. At that time the outer terminus of the Hayes Street line was at Devisadero and O'Farrell Streets. The cars ran along Devisadero to Eddy, down Eddy to Steiner, over Steiner to Golden Gate Avenue, down Golden Gate Avenue to Fillmore, over Fillmore to McAllister, down McAllister to Laguna, over Laguna to Hayes, down Hayes to Market, and down Market to the Ferry. The line entered Hayes at Hayes and Laguna and then went easterly on Hayes to Market, curved right into the tracks on Market Street and went to the Ferry. There were double tracks—went down one way and came back the other. I am familiar with the location at Hayes and Market Streets at the present time. The tracks upon which we were accustomed to run for the nine months I have spoken of after April 1878 were laid in practically the same position as the present existing tracks. I continued to be familiar with the condition of those tracks after I left the Hayes Street line. I was transferred from the Hayes Street line to the Valencia line and served four months on the Valencia Street line. Then I was promoted to be starter at the Ferry, and for thirteen months I was starter there. During all that time I retained my familiarity with the condition of the tracks at Hayes and Market Streets. Those tracks remained there as they had been until after September 14, 1879.

While I was a conductor on the Valencia Street line the outer terminus of that line was 26th and Valencia Street-, and the line then ran down Valencia to its intersection with Market, curved into Market and went down Market to the Ferry. There was a double track running from Valencia into Market, and from Market Street into Valencia; it went over a continuous line of tracks without any interruption.

I am familiar with the location of the tracks at the present time. During the time that I was a conductor on the Valencia Street line the tracks were in substantially the same position as they are at the present time, and that condition continued until on and after September, 1879. They were there before September, 1879, and I operated on them both before and after September, 1879. Both of these lines, Hayes and Valencia, were horse cars at that time. Prior to September, 1879, I was familiar with the tracks on Fifth Street at its intersection with Market. Those tracks curved into Market on Fifth Street and ran to the Ferry. That condition was true both before, during and after September, 1879. In one form or another I have been connected with the Market Street Railway Company and the success of the United Railroads up to the present time. I am

425 at present in the employ of the United Railroads. At the time of which I am speaking, from the Intersection of Valencia and Market Streets, thence out Market to Castro they used a steam dummy line. They ran from Noe and Market Streets to a car house

that was located at the intersection of Valencia and Market in practically the position where the remains of the old power house now are. This steam dummy used to come down to the intersection of Valencia and Market and ran out as far as Noe Street. That was before September 1879, and also after that date. The Market Street cars transferred to and from that steam dummy at the time I speak of. The steam dummy remained until the Castro Street cable was built and operated in the latter part of 1883."

Cross-examination:

"At the time that I have testified to—September 1879, the only lines which came into Market Street were the Valencia, the Hayes and the 5th Street lines. No other lines which are now existing were then operating over the Market Street system. They were then operated by other companies. The only line on McAllister Street was the horse car line that I have mentioned. That line ran from Fillmore to Laguna on McAllister. There was no line coming down McAllister to Market at that time. It was first established in the latter part of 1883 in connection with the Market Street Cable System. They never had a turn table at the junction of Market and McAllister Streets. They ran right through. They had a turn table at the other end. The only turn table on Market Street was at 5th Street at one time. They did not have any other turn tables on Market Street that I am aware of. There were no horse cars that ran down to Market Street with the Market Street Railway. There were none that came down to Market Street and stopped there that I know of. I remember none. The horse cars ran along Market Street out Valencia to 26th Street. On Market from Valencia out to Noe was a steam dummy. When the Hayes Street car line was changed to a cable line it did not stop at Market Street but came right in."

Redirect examination:

"After the horse car lines were changed into cable lines the cable cars ran from Valencia Street into Market Street and back without any turn table. They ran from Hayes Street into Market and back without any turn table, on continuous tracks. The same applies to McAllister Street when a cable line was constructed at that point. The same applied to Haight Street. From the time that the cable cars started to operate they operated continuously on that system in the way I have described up to the time that the several lines were changed into electric lines. The operation was continued uninterruptedly in the way that I have described."

426 It was here admitted by counsel for the defendants that after the passage of the ordinance of June 12, 1906, the cable lines of the Complainant were re-constructed and turned into electric lines, and that the re-construction cost a sum of money in excess of $2,500,000. It was further admitted that the work of re-construction commenced about June 19, 1906, a few days after the passage of the ordinance, and continued without interruption until completion, and

as the several units in the system were completed they were operated by electricity, and from the time of the completion of the whole system it has been continuously operated by electricity.

Counsel for the defendants here offered and there was received in evidence an agreemnet made on November 19, 1912, between the City and County of San Francisco, a municipal corporation, United Railroads of San Francisco, the complainant herein, and the Sutter Street Railway Company, a corporation. Said agreement reads as follows:

"Memorandum of agreement made this 19th day of November, A. D. 1912, by and between the City and County of San Francisco, a municipal corporation, party of the first part, and United Railroads of San Francisco, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part, and the Sutter Street Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of California, party of the third part, witnesseth:

Whereas, by ordinance known as Ordinance No. 923 (New Series), approved October 25th, 1909, the City and County of San Francisco passed what is known as Bill No. 1047 (New Series), Ordinance No. 923, determining and declaring that public interest and necessity demanded the construction of street railways along and upon the following streets, to-wit:

1. On Geary Street, from Market Street to Point Lobos Avenue; Point Lobos Avenue, from Geary Street to Cliff Avenue; Cliff Avenue from Point Lobos Avenue, to a convenient terminal near the Ocean; Tenth Avenue from Point Lobos Avenue to Golden Gate Park;

2. Over and along Market Street from Geary Street to East

427 Street;

And thereafter the said Board of Supervisors of said City and County duly called a special election to be held in said City and County on the 30th day of December, 1909, for the purpose of submitting to the electors of said City and County the proposition, among other things, to incur a bonded indebtedness for the construction by said City and County of a street railway over and along said hereinabove described route, at which said election it was declared and determined to construct said Railroad; and,

Whereas, United Railroads of San Francisco is the owner and is operating its railroads in the City and County of San Francisco, and particularly over and along Market Street from Geary Street to East Street, and from Thirty-third Avenue and Point Lobos Avenue along Point Lobos Avenue westerly to Forty-eighth Avenue, and on Sutter Street from Market Street to Presidio Avenue, the right to operate and maintain which said railroad was granted by Order No. 1514 of said City and County, passed by the Board of Supervisors thereof on September 15th, 1879, and approved by the Mayor thereof on September 20th, 1879, and by Order No. 2781 of said City and County passed by the Board of Supervisors thereof on July 9th, 1894, and approved by the Mayor thereof on July 9th, 1894; and by Order No. 1525 passed by the Board of Supervisors of said City and County on No-

vember 3rd, 1879, and approved by the Mayor thereof on November 14, 1879; and

Whereas, it is the desire of the parties hereto for the greater convenience and accommodation of the traveling public, and in compromise and settlement of the case of The People of the State of California, ex rel., D. S. O'Brien vs. Sutter Street Railway Company, which case is now pending on appeal to the Supreme Court of the State of California, from a judgment rendered by the Superior Court of the State of California, in and for the City and County of San Francisco on the 24th day of November, 1911, and entered on the 9th day of January, 1912, and recorded in Judgment Book No. 51, at page 471, of the records of said Superior Court, as well also in compromise and settlement of litigation which might be commenced by United Railroads of San Francisco concerning the right of the City to run its municipal railway on Market Street from Geary Street to the City Front, said United Railroads of San Francisco claiming the same to be in violation of Order No. 1514, as hereinabove set forth.

Now, therefore, it is mutually agreed by and between the parties herto, as follows:

(1) Sutter Street Railway Company consents to an affirmance by the Supreme Court of the State of California of the judgment of the Superior Court of the City and County of San Francisco, in the case of The People of the State of California, ex rel., D. S. O'Brien vs. The Sutter Street Railway Company, which judgment was rendered on the 24th day of November, 1911, and entered on the 9th day of January, 1912, and recorded in Judgment Book 51, page 471,
428 of the records of said Superior Court, said judgment of affirmance to include a modification of the judgment of the Superior Court in accordance with the provisions of this agreement.

(2) United Railroads of San Francisco hereby waives its right to object to the use by the City and County of San Francisco of Market Street from Geary Street to the City Front under the provisions of Sec. 5, of Order No. 1514, of the Board of Supervisors of the City and County of San Francisco, and under the provisions of Sec. 499 of the Civil Code of the State of California, and hereby consents to the operation of said Municipal Railway by the City and County of San Francisco on Market Street, from Geary Street to the City Front, as herein stipulated. By accepting the waiver of United Railroads of San Francisco of right to object to the use by the City and County of San Francisco, of Market Street from Geary Street to the City Front, and by accepting the consent of said United Railroads of San Francisco to the operation of said Municipal Railway on Market Street, it is expressly understood and agreed by the parties hereto that the City and County of San Francisco does not admit the necessity of such waiver or consent, or the right of said United Railroads of San Francisco to object to said use of Market Street, from Geary Street to the City Front for a Municipal Railway, but, on the contrary, the City and County of San Francisco claims that regardless of such waiver and consent, and regardless of the provisions of Sec. 5 of said Order No. 1514, and of Sec. No. 499 of the Civil Code of the State of California, it has the legal right to operate said Municipal

Railway on Market Street, as aforesaid, from Geary Street to the City Front. The Sutter Street Railway Company does not now object, and never will object, and concedes it has no right to object to the use by the City, of Market Street from Geary Street to the City Front, or to the use of the outer track on Market Street, from Sutter Street to the City Front for the operation of said Municipal Railway.

(3) Sutter Street Railway Company and/or its assigns, and the City and County of San Francisco, shall have the joint ownership and use of outer tracks and appurtenances, and fixtures in the street and overhead equipment, except poles on Market Street, from Sutter Street to the City Front, heretofore constructed by Sutter Street Railway Company, upon payment by the City and County of San Francisco of one-half of the actual value of said outer tracks and appurtenances and fixtures in the street and said overhead equipment, it being understood and agreed that the Sutter Street Railway Company and the City and County of San Francisco shall each be liable for and shall pay one-half of the cost of maintenance, repair, and of such replacement as the Board of Public Works may deem necessary, of said outer tracks and appurtenances and fixtures in the street and overhead equipment after the joint operation shall have commenced.

Said value of said outer tracks and appurtenances and fixtures
429 in the street and overhead equipment shall be determined by arbitrators, one appointed by the Board of Public Works of the City and County of San Francisco, and one appointed by Sutter Street Railway Company, and, in the event of a disagreement between them they shall select an umpire, and the decision of the umpire as to such value —, shall the City and County of San Francisco pay more than Twenty-five Thousand (25,000) Dollars for its one-half interest.

(4) Sutter Street Railway Company and/or its assigns is hereby granted the privilege to operate cars over said outer tracks, with electricity, by means of the overhead trolley system, for a period of years up to and including the 14th day of November, 1929, at midnight of which day the right herein granted to the Sutter Street Railway Company and/or its assigns, shall terminate absolutely, and the City and County of San Francisco shall have the right to purchase, from said Sutter Street Railway Company, its one-half interest in said tracks, appurtenances, fixtures in the streets, and equipment, upon payment therefor of fifty (50) per cent. of the value thereof on the date of expiration of said privilege, said value to be determined in the manner herein set forth. Said privilege shall not become operative until the judgment of affirmance, as modified by the said Supreme Court, shall have been entered. Said Sutter Street Railway Company and/or its assigns agrees that it will not operate or attempt to operate any cars over said outer tracks other than those operated on Sutter Street over the entire distance from Market Street to Central Avenue, and cars operated over the entire right-of-way from Central Avenue west, described in Order No. 2781 granting to Adolph Sutro, his successors, and assigns, certain rights and privileges therein specified, except such cars of the Jackson Street line as may be diverted from Jackson Street into Fillmore Street, and thence into Sutter Street, and no cars operated by said United

Railroads of San Francisco or Sutter Street Railway Company, switched into Sutter Street from streets intervening between Market Street and Central Avenue, except the Jackson Street cars, as aforesaid, shall ever be operated on said outer tracks provided, however, that the headway or interval between cars, of the said cars other than the cars of said Municipal Railway, so permitted by this agreement to be operated on said outer tracks, shall, at no time, be less than one and one-half (1½) minutes. Nothing in this paragraph shall be construed to revive or extend any rights, privileges or franchises granted by said Order No. 2781, heretofore abandoned or forfeited by United Railroads of San Francisco or its predecessors.

(5) The City and County of San Francisco shall have, and is hereby given the right, to string its wires for the operation of the cars of the Municipal Street Railway on Market Street from Geary Street to the City Front upon the poles of the United Railroads of San Francisco, without any charge or compensation therefor.

(6) The electric current supplied by the United Rail-
430 roads of San Francisco and used by the Municipal Street Railway, shall be paid for by said City and County of San Francisco in proportion to its use. In arriving at the charge for current, the car miles operated over the joint tracks will be multiplied by the number of kilowatt hours per car mile used by these cars, and the product in turn multiplied by the price per kilowatt hour, which will be the cost price to the United Railroads of San Francisco. If this exceeds the price paid by said City and County of San Francisco for street railway purposes, the United Railroads of San Francisco will base its charge upon the same price as that paid by the City and County of San Francisco.

(7) Transfers shall be exchanged by the United Railroads of San Francisco and the City and County of San Francisco at the intersection of Geary Street with Devisadero Street, between the Devisadero Street lines of the United Railroads of San Francisco and the lines of the Municipal Railway on Geary Street. Transfers issued for this point of intersection, however, shall not be honored by either party to this agreement unless presented by passengers boarding the cars at this point. Transfers shall be exchanged by the above named parties at the intersection of Geary Street with Fillmore Street between the Filmore Street lines of the United Railroads of San Francisco and the said line of the Municipal Railway. Transfers issued for this point of intersection, however, shall not be honored by either party to this agreement unless presented by passengers boarding the cars at this point. There shall be no compensation from any party to the other for the honoring of transfers at the intersection of the Municipal Railway with the lines of the United Railroads of San Francisco at Devisadero and Fillmore Streets, except the reciprocal privilege of transferring passengers. Transfers shall also be exchanged, should the City so elect, by the above mentioned parties at the following places and upon the following terms, namely:

At the intersection of Geary Street with Larkin Street, between the Larkin Street lines of the United Railroads of San Francisco

and the said line of the Municipal Railway. Transfers issued for this point of intersection, however, shall not be honored by either of the above named parties unless presented by passengers boarding the cars at this point of intersection, and also at the intersection of Geary Street with Kearny Street, between the Kearny Street and Third Street lines of United Railroads of San Francisco and the said line of the Municipal Railway. Transfers issued for this point of intersection, however, shall not be honored by either party to this agreement unless presented by passengers boarding the cars at this point of intersection. All transfers from the United Railroads of San Francisco collected at the intersection of the Municipal Railway and Kearny and Larkin Street lines of the United Railroads of San Francisco by Municipal Railway on its said line shall be redeemed at the end of each month by United Railroads of San Francisco at the rate of two (2) cents each; all transfers from
431 said Municipal Railway collected at the intersection of the Municipal Railway and the Kearny and Larkin Street lines by United Railroads of San Francisco on its Larkin and Kearny Street lines, shall be redeemed at the end of each month by the City and County of San Francisco at the rate of three (3) cents each.

Transfers shall be issued under such traffic rules and regulations as shall be mutually agreed upon by the parties hereto, to prevent the misuse and abuse of the privilege.

The right, if exercised by the City, to exchange transfers at Kearny and Larkin Streets shall continue from whatever date the City elects until January 1st, 1917, when further transfer arrangements may be made upon such terms and conditions as may be mutually agreed upon between the parties hereto.

The said City and County of San Francisco shall have the right, at any time, to abrogate this transfer arrangement, as to all of said intersecting lines, or any of them.

The provisions of this paragraph are and shall be without prejudice to any right which the City and County of San Francisco has, or may hereafter have under the Constitution and laws of the State of California, and the Charter and Ordinances of the City and County of San Francisco, to require exchange of transfers at other points along the line of the Municipal Railway.

The transfer privileges herein granted shall not be extended to permit transfers from Market Street lines of the United Railroads to Municipal Railway, or to permit transfers from Municipal Railway to Market Street lines of United Railroads, nor shall passengers boarding a Municipal Railway car on Market Street going west transfer on the Kearny Street line of United Railroads of San Francisco, unless the parties hereto subsequently agree thereto.

(8) Cars of the Municipal Street Railway operated by the City and County of San Francisco have the right to run through to the City Front upon the tracks to be constructed by said City and County of San Francisco on Market Street from Kearny Street to Sutter Street, there connecting with the so-called outer tracks heretofore constructed by Sutter Street Railway Company, thence upon Market Street from Sutter Street to the City Front upon said outer tracks.

In the event of blockade on said outer tracks, or interruption of traffic thereon, or cessation of current between Sutter Street and the City Front, the City and County of San Francisco shall have the right without cost, to switch the cars of the Geary Street Municipal Railway on the middle tracks of the United Railroads of San Francisco until said blockade is cleared, the cause of interruption of traffic removed, or the current resumed.

For the purpose of said switching, the City and County of San Francisco shall have the right, now or at any future time, to construct the necessary switching tracks at places to be selected by said City and County. In no event, however, shall the United Railroads have the reciprocal, or any right to switch its cars onto said
432 outer tracks.

(9) It is mutually agreed by the parties hereto that this agreement shall cover the so-called loops of the City Front, or any other loops or terminal system that may hereafter be constructed, and shall permit the operation of the cars of the Municipal Railway upon and over said loops or terminal system and each of them.

(10) The City and County of San Francisco has the right to operate its Municipal Street Railway on Geary Street, formerly known, and hereinbefore referred to, as Point Lobos Avenue, from Thirty-third Avenue to Forty-eighth Avenue over tracks of the United Railroads of San Francisco, and thence to Cliff Avenue, formerly Point Lobos Avenue, whenever it shall desire so to do, upon the payment of an equal proportion of the value of the tracks and appurtenances so used by the City and County of San Francisco and the United Railroads of San Francisco jointly, at the time of the commencement of such use. Said value shall be determined in the manner hereinbefore provided for the determination of the value of the outer tracks on lower Market Street. Said United Railroads and said City and County shall be liable to pay one-half of the cost of maintenance, repair and replacement of said tracks and overhead equipment on Geary street from Thirty-third Avenue to Forty-eighth Avenue, after such joint operation shall have commenced. The City and County of San Francisco shall pay for the cost of current over said portion of said tracks of United Railroads as in this agreement provided for the cost of current used by the City and County of San Francisco for the operation of said cars on Market Street, as aforesaid.

(11) No provision, word or expression in this agreement shall be construed as granting the Sutter Street Railway Company and/or its assigns any right on Market Street beyond November 14, 1929.

(12) This agreement is and shall be without prejudice to any right which the City and County of San Francisco has, or may hereafter have, under the Constitution and Laws of the State of California, and the Charter of the City and County of San Francisco to regulate street railroads, tracks and cars, and the management, maintenance and operation thereof, and without prejudice to any of its rights under ordinances of the Board of Supervisors heretofore or hereafter adopted, all of which rights are expressly reserved by said City and County, it being understood and agreed that neither

the Sutter Street Railway Company nor the United Railroads of San Francisco, by consenting to this provision shall be deemed to have waived any of its rights, except as in this agreement set forth.

(13) Nothing in this agreement shall be construed to validate any rights, privileges or franchise granted either to the United Railroads of San Francisco or the Sutter Street Railway Company or their predecessors which may have become, or which may hereafter become invalid for any cause whatsoever.

(14) In the event of the failure or refusal of the Supreme Court to modify said judgment in the case of The People of the State of California, ex rel. D. S. O'Brien, vs. Sutter Street Railway
433 Company, in all of the respects hereinabove provided for, then this agreement shall become null and void and shall be of no force or effect whatever.

In witness whereof, said City and County of San Francisco has by resolution of its Board of Supervisors caused its name to be hereunto subscribed by its Mayor, and its Great Seal to be hereunto attached by the Clerk of its Board of Supervisors, the United Railroads of San Francisco and Sutter Street Railway Company have by resolution of their respective Boards of Directors caused their names to be subscribed hereto by their respective Presidents, Assistants to their Presidents, or Vice Presidents, and their respective corporate seals to be hereunto attached by their respective Secretaries, the day and year first hereinabove written.

Done in triplicate.

CITY AND COUNTY OF SAN FRANCISCO,
By JAMES ROLPH, JR., *Mayor.*

Attest:
[SEAL.] JOHN W. ROGERS,
Acting Clerk of the Board of Supervisors.

UNITED RAILROADS OF SAN FRANCISCO,
By THORNWELL MULLALLY,
Assistant to the President.

Attest:
[SEAL.] GEO. B. WILCUTT, *Secretary.*

SUTTER STREET RAILWAY COMPANY,
By FRED C. BOECKMANN,
President.

Attest:
[SEAL.] H. S. SCOTT, *Secretary.*

Witnesses:
THOS. E. HAVEN.
WM. M. ABBOTT."

In connection with the foregoing agreement it was admitted that the action of the People of the State of California ex rel. D. S. O'Brien vs. Sutter Street Railway Company, referred to in said agreement, was a suit in quo warranto, brought by the People of the State of California against the Sutter Street Railway Company to forfeit the franchise of that company upon the ground that the service rendered by its horse cars was not sufficient, that in that suit, a judgment of forfeiture was entered on the 9th day of January, 1912, and
434 that in due course the Sutter Street Railway Company appealed from said judgment, and that the agreement above mentioned was made by the parties thereto in compromise of the matters involved and in modification of the judgment so entered.

Counsel for the defendants also offered and there was received in evidence the decision of the Supreme Court of the State of California modifying the said judgment in accordance with said agreement above set forth. Said decision reads as follows:

"Decision of the Supreme Court of the State of California.

The parties above named having settled the differences between them as presented by the pleadings, findings and judgment herein and having agreed that the judgment appealed from shall be modified and affirmed as so modified, and having filed a stipulation setting forth the said agreement and the terms of the modification agreed to: Now, therefore, in pursuance of said agreement, this court makes its judgment as follows:

The judgment of the Superior Court of the City and County of San Francisco herein appealed from is modified so as to read as follows:

It is ordered, adjudged and decreed that the defendants, Sutter Street Railway Company, may exercise the franchise and privilege of maintaining the street railway tracks from Sutter Street to the City Front, being the tracks known as the "Outer tracks" running on each side of the tracks maintained by the United Railroads on Market Street in said City and County, and may maintain and operate a street railway on Market Street from Sutter Street to the City Front, upon the following terms and conditions, and not otherwise:

1. The Sutter Street Railway Company and the City and County of San Francisco shall have the joint ownership and use of the said outer tracks and appurtenances and fixtures in the street and overhead equipment, except poles, on Market Street, from Sutter Street to the City Front, heretofore constructed by the Sutter Street Railway Company, upon payment by the City and County of San Francisco of one-half of the actual value thereof, and Sutter Street Railway Company, and said City and County shall each pay one-half and be liable for one-half of the cost of maintenance and repair thereof and of such replacement as the Board of Public Works of said City and County may deem necessary, of the same, after the joint operation shall have commenced. Said value of said outer tracks, appurtenances, fixtures in the street and over-

435 head equipment to be determined as provided in the said agreement filed by the parties herein and not to exceed the sum therein mentioned, to-wit: $25,000.00 for the one-half thereof.

2. Sutter Street Railway Company may operate cars over said outer tracks with electricity by means of the overhead trolley system for the period of years beginning from the time of the making of this judgment of modification and affirmance and ending on the 14th day of November, 1929, at midnight, at which time said right and privilege shall terminate and said Sutter Street Railway Company shall thereafter be under obligation to sell its one-half interest in said tracks, appurtenances, fixtures in the street and equipment to the City and County of San Francisco, at the time, in the manner and upon the terms prescribed in the agreement of the parties aforesaid filed herein. Sutter Street Railway Company shall not operate or attempt to operate any cars over said outer tracks other than those operated over Sutter Street over the entire distance from Market Street to Central Avenue and cars operated over the entire right-of-way west from Central Avenue, described in Order No. 2781, granting to Adolph Sutro, his successors and assigns certain rights therein specified, except such cars of the Jackson Street line as may be diverted from Jackson Street into Fillmore Street and thence into Sutter Street. No cars switched into Sutter Street from streets intervening between Market Street and Central Avenue, except the Jackson Street cars as aforesaid, shall ever be operated on said outer tracks. The headway or interval between cars herein permitted to be operated on said outer tracks, other than the cars of Municipal Railway mentioned in said agreement, shall at no time be less than one and one-half minutes. This shall not be understood to revive or extend any right, privilege or franchise granted by said Order No. 2781.

3. Sutter Street Railway Company shall allow the said City and County to connect the tracks of its Municipal Railway, extending from Geary and Market Streets on Market Street to Sutter Street, with the said outer tracks and to operate the cars of said Municipal Railway thereon from Sutter Street to the City Front and from the City Front to Sutter Street. This joint use and operation shall include the so-called loops at the City Front, or any other loops or terminal system that may hereafter be constructed there and used by the cars operated by said Sutter Street Railway Company, its successors or assigns, and cars of said Municipal Railway shall be permitted to be operated over such loops or terminal system and each of them.

4. The rights and privileges, obligations and burdens hereby given to and imposed upon the Sutter Street Railway Company shall also belong to and be imposed upon its successors and assigns. Nothing herein shall be deemed to adjudicate upon or confirm the other provisions of the said agreement filed herein, or the rights and obligations of other parties thereto; nor shall it in any wise affect or impair such rights or obligations, but the same shall be
436 understood to derive their binding force wholly from the binding force of the agreement as a contract between the parties who have signed the same.

5. The franchise heretofore enjoyed by Sutter Street Railway Company to maintain and operate a street railway on Market Street over the said outer tracks is hereby declared to be forfeited and annulled, except in so far as such use is permitted under the terms and conditions hereinabove stated in the agreement herein referred to and this order.

As so modified, the said judgment of the Superior Court is affirmed.

Remittitur will be issued forthwith."

It was here admitted by counsel for the complainant that Ordinance No. 1514 (New Series) hereinbefore referred to, was finally passed less than ninety days after it was introduced.

The foregoing was all of the evidence offered or received upon the trial.

Stipulation to Correctness of Statement of Evidence.

It is hereby Stipulated by and between the respective parties hereto, that the foregoing is a full, true and complete statement of the evidence in the above entitled cause, and that said statement may be approved by the above entitled court, or a judge thereof, without notice to either of the parties hereto.

Dated, August 22nd, 1917.

WM. M. ABBOTT,
WM. M. CANNON,
GARRET W. McENERNEY,
(B.,)
Solicitors for Complainant.
GEORGE LULL,
THOS. E. HAVEN,
Solicitors for Defendants.

437 It appearing that the foregoing statement of the evidence in the above entitled cause is a true and complete statement of the evidence in said cause and that it has been properly prepared, said statement is hereby approved as a statement of the evidence in said cause.

Dated, August 23, 1917.

(Sgd.) WILLIAM H. HUNT, *Judge.*

Receipt of a copy of the within Statement of Evidence, Stipulation and Order this 22nd day of August, 1917, is hereby admitted

(Sgd.) GEORGE LULL,
(Sgd.) THOS. E. HAVEN,
Attorneys for Defendants.

Endorsed: Filed Aug. 23, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

438 In the District Court of the United States, Ninth Circuit in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Petition for Appeal to the Supreme Court of the United States.

To the Honorable Wm. C. Van Fleet, Judge of the Southern Division of the District Court of the United States, Ninth Circuit in and for the Northern District of California, Second Division:

439 The above named complainant, feeling itself aggrieved by the decree made and entered in this cause on the 24th day of January, A. D. 1917, denying to the complainant the relief prayed for by it in its bill of complaint, and vacating a temporary restraining order and a writ of injunction pendente lite, theretofore issued in said cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner further prays that the proper order be made touching the security to be required of it to perfect its appeal.

Dated, April 24th, 1917.

WM. M. CANNON,
WM. M. ABBOTT,
GARRET W. McENERNEY,
Solicitors for Complainant.

The foregoing petition is hereby granted and the appeal therein mentioned is allowed upon the complainant giving a bond conditioned as required by law, in the sum of five hundred Dollars ($500), to be approved by this court.

Dated, — 24th, 1917.

WM. C. VAN FLEET,
Judge of the Southern Division of the District Court of the United States, Ninth Circuit in and for the Northern District of California, Second Division.

Endorsed: Filed Apr. 24, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

440 In the District Court of the United States, Ninth Circuit in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant.

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Assignment of Errors.

United Railroads of San Francisco, a corporation, complainant in the above entitled cause, filing herewith its petition praying

441 an appeal to the Supreme Court of the United States from the final decree of this court made and entered on the 24th day of January, A. D. 1917, in favor of the defendants and against said complainant, now assigns as errors in the said decree, and the rulings of the court therein, the following:

1. The said court erred in denying the application of complainant for an injunction.

2. The said court erred in vacating and setting aside the preliminary restraining order and the writ of temporary injunction issued in said cause at the time of the filing of the bill of complaint therein.

3. The said court erred in holding and deciding that the facts shown were not sufficient to entitle the complainant to the relief sought and prayed for, or any relief.

4. The said court erred in refusing to grant the final injunction prayed for in complainant's amended bill of complaint.

5. The said court erred in holding and deciding that the construction of tracks by the defendants outside of and parallel to the tracks of the complainant will violate no provision of the Constitution of the United States.

6. The said court erred in holding and deciding that the construction of tracks by the defendants outside of and parallel to the tracks of the complainant will violate no provision of the Constitution of the State of California.

7. The said court erred in holding and deciding that the operation of street-cars by the defendants on tracks outside of and parallel to the tracks of the complainant will violate no provision of the Constitution of the United States.

8. The said court erred in holding and deciding that the
442 operation of street-cars by the defendants on tracks outside of and parallel to the tracks of the complainant will violate no provision of the Constitution of the State of California.

9. The said court erred in holding and deciding that the construction of tracks for more than five blocks on the same streets on which tracks of the complainant are constructed, and the operation of street-cars thereon by the defendants, will violate no provision of the Constitution of the United States.

10. The said court erred in holding and deciding that the construction of tracks for more than five blocks on the same streets on which tracks of the complainant are constructed, and the operation of street-cars thereon by the defendants, will violate no provision of the Constitution of the State of California.

11. The said court erred in holding and deciding that the provisions of Section 499 of the Civil Code of the State of California in force and effect at the time that the franchise of the complainant, approved September 20, 1879, was granted to it, in so far as they prohibited the use and occupation of a street by two railroad corporations for a distance of more than five blocks did not affect or apply to or include a municipal corporation owning and operating a street railroad.

12. The said court erred in holding and deciding that the pro-

visions of Section 499 of the Civil Code of the State of California, in force and effect at the time that the franchise of the complainant, approved September 20, 1879, was granted to it, did not enter into and become a part of said franchise and of the obligation thereof.

13. The said court erred in holding and deciding that
443 the prohibition in Section 499 of the Civil Code of the State of California, as that section existed on September 20, 1879, against the use or occupation of a public street by two street railroad companies for more than five blocks, was a mere limitation upon the power of the Board of Supervisors of the City and County of San Francisco to grant a franchise permitting such use or occupation, and not a prohibition against such occupation and use itself.

14. The said court erred in holding and deciding that the prohibition mentioned in the preceding assignment was such as might be removed by amendment of said section, and further in holding and deciding that the same was removed by subsequent amendments of said section.

15. The said court erred in holding and deciding that any of the amendments of said Section 499 of the Civil Code of the State of California, made after complainant's franchise, approved September 20, 1879, was granted to it, were as against the complainant valid or lawful.

16. The said court erred in holding and deciding that under Section 499 of the Civil Code of the State of California as such section existed on September 20, 1879, or under any amendment of said section, the defendants were or are authorized or empowered to construct or operate a competing line of street railroad for more than five blocks on any street included within complainant's franchise, approved September 20, 1879.

17. The said court erred in holding and deciding that complainant's franchise, approved September 20, 1879, was and is not exclusive for all exceeding five blocks on each street mentioned in said franchise.

18. The said court erred in holding and deciding that
444 by the terms and conditions of the complainant's franchise, approved September 20, 1879, and by the provisions of the law of the State of California in force at the time of the granting of the same, the City and County of San Francisco is not prohibited from competing with the complainant on tracks constructed for more than five blocks on any street mentioned in said franchise.

19. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate that provision of the Constitution of the United States which declares that no state shall pass a law impairing the obligation of contracts.

20. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the

provision of the Constitution of the State of California which declares that the obligation of contracts shall not be impaired.

21. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the provision of the Constitution of the United States which declares that no state shall deprive any person of property without due process of law.

22. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in
445 the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the provision of the Constitution of the State of California which declares that no person shall be deprived of property without due process of law.

23. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the provision of the Constitution of the United States which declares that all are entitled to the equal protection of the law.

24. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the provision of the Constitution of the United States which declares that private property shall not be taken for public use except upon payment of compensation.

25. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the provision of the Constitution of the State of California which declares that private property shall not be taken for public use except upon payment of compensation.

26. The said court erred in holding and deciding that the construction and operation of the line of municipal railway in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not violate the
446 provision of the Constitution of the State of California which prohibits the damaging of private property for public use without prepayment of compensation.

27. The said court erred in holding and deciding that the construction and operation of the line of municipal railway, in the manner mentioned in assignment No. 18 above, in competition with and as a competitor of the complainant, will not inflict damage upon the property of the complainant not resulting solely from competition.

28. The said court erred in holding and deciding that the defendants might lawfully cut the rails and cross the tracks of the complainant without prepayment of compensation.

29. The said court erred in holding and deciding that defendants might construct and operate a municipal railway system in competition with and as a competitor of the complainant for more than five blocks on streets mentioned in complainant's franchise, approved September 20, 1879, without prepayment of compensation to the complainant for the damage, apart from competition, that it would suffer through prospective passengers being thereby prevented or deterred from reaching the cars of the complainant.

30. The said court erred in holding and deciding that the defendant City and County of San Francisco, a municipal corporation, had complied with the provisions of Section 2 of Article XII of the Charter of said City and County relative to the solicitation and consideration of offers of the sale to said City and County of existing utilities before constructing or acquiring a new utility.

31. The said court erred in holding and deciding that the defendant City and County of San Francisco, a municipal corporation, had solicited and considered offers for the sale to said City and
447 County of the lines of the complainant before proceeding to construct the lines of municipal railway, the construction of which is, by the bill of complaint herein, sought to be enjoined.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the court, and prays that such disposition thereof be made as is in accordance with law and the statutes of the United States in such cases made and provided; and further, that said order and decree be reversed and the above-entitled District Court directed to grant to the complainant the injunction for which it prays in its bill of complaint.

WM. M. CANNON,
WM. M. ABBOTT,
GARRET W. McENERNEY,
Solicitors for Complainant.

Endorsed: Filed Apr. 24, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

448 In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Bond on Appeal.

Know all men by these presents: That we, United Railroads of San Francisco, a corporation, as principal, and National Surety
449 Company, a corporation organized under the laws of the State of New York, as surety are held and firmly bound to City and County of San Francisco, a municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and Ex-officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and

as members of and constituting the Board of Public Works of said City and County of San Francisco, a municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a municipal corporation, defendants and respondents in the above-entitled cause, in the sum of Five Hundred Dollars to be paid to said defendants and respondents, for the payment of which well and truly to be made we hereby bind ourselves, our executors, administrators and assigns jointly and severally firmly by these presents.

We do further agree that in the case of the breach of any condition of this undertaking the above-entitled court may, upon notice to us of not less than ten (10) days, proceed summorily in the above-entitled suit to ascertain the amount which we are bound
450 to pay on account of such breach, and render judgment therefor against us, and award execution against us on said judgment.

Witness our hand and seals this 24th day of April, 1917.

Whereas on the 24th day of January, 1917, in the Southern Division of the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Second Division, in a suit pending in that court wherein said United Railroads of San Francisco, complainant above-named, was complainant and the respondents above-named were defendants, numbered on the Equity Docket as 280, a decree was rendered against the said complainant; and the said complainant having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the clerk of the court, to reverse the said decree, and a citation directed to the above-named respondents citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be held in the City of Washington, District of Columbia, on the 23rd day of June, A. D. 1917.

Now, Therefore, the condition of the above obligation is such that if the said United Railroads of San Francisco shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

UNITED RAILROADS OF SAN FRANCISCO, A CORPORATION,
[SEAL.] By JESSE W. LILIENTHAL, *President*.
By GEO. B. WILLCUT, *Secretary*.
[SEAL.] NATIONAL SURETY COMPANY, A CORPORATION,
By FRANK L. GILBERT,
Its Attorney in Fact.

Approved:
WM. C. VAN FLEET, *Judge*.

451 Endorsed: Filed Apr. 24, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

452 (Title of Court and Cause.)

Præcipe for Transcript.

To the Clerk of the above-entitled Court:

You will please prepare Transcript of Record in said cause as required by law, to be filed not later than October 1, 1917 in the office of the Clerk of the Supreme Court of the United States under the appeal heretofore perfected to said Court, and include in said Transcript the following pleadings, proceedings and papers, to-wit:

(*a*) Bill of Complaint for Injunction filed herein June 12, 1916.

(*b*) The Subpœna issued to the defendants, and proof of its service.

(*c*) Affidavits of M. McCants and J. Harry Mentz, filed herein June 13, 1916, in support of motion for Temporary Restraining Order.

(*d*) Order to Show Cause and Temporary Restraining Order made and filed herein June 13, 1916.

(*e*) Bond filed June 13, 1916, as required by Temporary Restraining Order.

(*f*) Amended Bill of Complaint for Injunction filed herein August 17, 1916.

(*g*) Answer filed herein August 21, 1916.

(*h*) Amendments to Amended Bill of Complaint for an Injunction filed herein August 24, 1916.

(*i*) Joint and Several Answer of the Defendants and Respondents to Amendments to Amended Bill of Complaint filed herein August 30, 1916.

(*j*) Opinion Denying Motion for an Injunction, filed herein January 18, 1917.

(*k*) Final Decree, filed herein January 24th, 1917.

453 (*l*) Petition for Allowance of Appeal and Order Allowing Appeal, filed herein April 24, 1917.

(*m*) Assignment of Errors filed herein April 24, 1917.

(*n*) Bond on Appeal, filed herein April 24, 1917.

(*o*) Citation on Appeal, filed herein April 24, 1917.

(*p*) Statement of Evidence in said cause, a copy whereof is filed contemporaneously with the filing of this Præcipe.

(*q*) All Minutes of the Court and Orders made in the cause.

(*r*) All Certificates made by the Clerk of this Court with reference to the proceedings, rulings and decrees of the Court herein.

(*s*) The Certificate of the Clerk of this Court to the correctness of the Record on Appeal in this cause.

(*t*) All endorsements of filings, and acknowledgments and proof of service of pleadings and other documents filed in the cause and mentioned above.

Dated: August 23rd, 1917.

WM. M. ABBOTT,
WM. M. CANNON,
GARRET W. McENERNEY,
Solicitors for Appellant.

Receipt of a copy of the within Præcipe for Transcript this 23rd day of August, 1917, is hereby admitted.

GEORGE LULL,
THOS. E. HAVEN,
Attorneys for Defendants & Respondents.

Endorsed: Filed Aug. 23, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

454 (Title of Court and Cause.)

Order Directing that Certain Original Exhibits be Transmitted to the Supreme Court for Inspection in Connection with Appeal.

It appearing to the Court that the photographic reproductions of plaintiff's Exhibits Nos. 3, 4, 6, 7, 8, 9 and 10 contained in the Statement of Evidence in the above entitled cause and to be included in the Record on appeal in said cause are greatly reduced in size and that it is proper that said original exhibits be inspected by the Supreme Court of the United States upon the hearing of the appeal herein;

It is hereby ordered that the Clerk of this Court transmit said original exhibits above mentioned to the Clerk of the Supreme Court of the United States with the record on appeal in said cause, for inspection by said Court in connection with said appeal.

Dated: August 24, 1917.

WM. H. HUNT, *Judge.*

Endorsed: Filed Aug. 24, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

455 In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, et al., Defendants and Respondents.

Clerk's Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing four hundred fifty-four (454) pages, numbered

from 1 to 454 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the præcipe for transcript of record (omitting therefrom the original exhibits, which by order of Court are transmitted herewith), as the same remain on file and of record in the above-entitled case, and that the same constitute the record on appeal to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript of record is $254.55; that said amount was paid by the attorneys for the complainant; and that the original Citation issued herein is hereunto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court this 17th day of September, A. D. 1917.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk United States District Court in and for the Northern District of California.

By J. A. SCHAERTZER,
Deputy Clerk.

456 Original.

In the District Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity.

No. 280.

UNITED RAILROADS OF SAN FRANCISCO, a Corporation, Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; James Rolph, Jr., Individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors Thereof; the Board of Supervisors of the City and County of San Francisco, a Municipal Corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes, and Oscar Hocks, Individually and as Members of and Constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, Individually and as Members of and Constituting the Board of Public Works of said City and County of San Francisco, a Municipal Corporation; Thomas A. Cashin, Individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a Municipal Corporation, and M. M. O'Shaughnessy, Individually and as City Engineer of the City and County of San Francisco, a Municipal Corporation, Defendants and Respondents.

Citation on Appeal.

United States of America to City and County of San Francisco, a municipal corporation; James Rolph, Jr., individually and
457 as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors thereof; the Board of Supervisors of the City and County of San Francisco, a municipal corporation; Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe, Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Haynes, and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco; T. A. Reardon, Daniel G. Fraser, and Adolph Judell, individually and as members of and constituting the Board

of Public Works of said City and County of San Francisco, a municipal corporation; Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a municipal corporation, Greeting:

You are hereby notified that in a certain case in equity in the Southern Division of the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Second Division, wherein United Railroads of San Francisco, a corporation, is complainant, and City and County of San Francisco, a municipal corporation, James Rolph, Jr., individually and as Mayor of the City and County of San Francisco and ex-Officio President of the Board of Supervisors thereof, the Board of Supervisors of the City and County of San Francisco, a municipal corporation, Cornelius J. Deasy, Andrew J. Gallagher, Fred L. Hilmer, Ralph McLeran, Charles A. Nelson, Edward L. Nolan, James E. Power, Fred Suhr, Jr., John O. Walsh, Edward J. Brandon, Edward I. Wolfe,
458 Joseph Mulvihill, John C. Kortick, Richard J. Welch, Joseph F. Lahaney, J. Emmet Hayden, J. D. Hynes and Oscar Hocks, individually and as members of and constituting the Board of Supervisors of said City and County of San Francisco, T. A. Reardon, Daniel G. Fraser and Adolph Judell, individually and as members of and constituting the Board of Public Works of said City and County of San Francisco, a municipal corporation, Thomas A. Cashin, individually and as Superintendent of the Municipal Railways of the City and County of San Francisco, a municipal corporation, and M. M. O'Shaughnessy, individually and as City Engineer of the City and County of San Francisco, a municipal corporation, are Defendants and Respondents, an appeal has been allowed to the complainant therein to the Supreme Court of the United States. You are hereby cited and admonished to be and appear in said Supreme Court of the United States at the City of Washington, in the District of Columbia, sixty (60) days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Wm. C. Van Fleet, Judge of the Southern Division of the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Second Division, this, the 24th day of April, 1917.

WM. C. VAN FLEET,
United States District Judge.

459 Receipt of a copy of the within Citation on Appeal is hereby admitted this 24th day of April, 1917.

GEORGE LULL,
J. B. F.,
City Attorney,
Atty. for Defendants & Respondents.

[Endorsed:] Original. #280. United States District Court, Ninth Circuit, Northern District of California. United Railroads of San Francisco, a corporation, Complainant, vs. City and County of San Francisco, etc., et al., Defendants and Respondents. Citation on Appeal. Garret W. McEnerney, Wm. M. Abbott, Wm. M. Cannon, Attorneys for Complainant. Holbrook Building, 58 Sutter Street, San Fransicso. Filed Apr. 24, 1917. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

Endorsed on cover: File No. 26,170. N. California D. C. U. S. Term No. 703. United Railroads of San Francisco, appellant, vs. City and County of San Francisco et al. Filed September 25th, 1917. File No. 26,170.

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Supreme Court of the United States

OCTOBER TERM, 1918

UNITED RAILROADS OF SAN FRANCISCO, *Appellant (Complainant below)*, vs. CITY AND COUNTY OF SAN FRANCISCO et al., *Appellees (Defendants below).*	No. 282

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal by the complainant below from a decree refusing it (complainant) any relief and in effect dismissing its bill for want of equity, after final hearing had in the District Court, Southern Division of the Northern District of California, Honorable William H. Hunt, circuit judge, presiding.* The jurisdiction of the court below was grounded in federal questions and not in diverse citizenship.

A. NATURE OF CASE AS PLEADED.

The appellant is a California corporation which operates a street railway system in San Francisco under various franchises therefor. The appellees are the City and County of San Francisco, a municipal cor-

* *United Railroads v. San Francisco* (1917 N. D. Cal.), 239 Fed. 987; R. 183.

poration, the chief executive, and the legislative body thereof (the Mayor and the Board of Supervisors) and other municipal officials who have charge of the operation of a municipally owned street railway system.

By its bill of complaint the appellant sought to enjoin the appellees from constructing tracks and operating cars outside of and parallel to the tracks of the appellant on streets covered by the latter's franchise and upon which it was already operating on one street for a distance of twenty-one consecutive blocks and on another street for a distance of two blocks, the latter construction, however, being an adjunct to the construction appertaining to the twenty-one blocks.

The bill of complaint raised federal and state questions. The appellant contended and alleged that the construction of the municipal tracks coupled with the operation of the cars thereon in the manner authorized by the ordinances would so interfere with the exercise and enjoyment of the complainant's franchise (whether exclusive or not) as to involve (a) an impairment of the obligation of that franchise in violation of the federal constitution, (b) a "taking" of the complainant's property in violation of the federal and the state constitutions and (c) a "damaging" of the complainant's property under the state constitution. In other words the complainant alleged that the *manner* in which the defendants purposed to construct and operate the municipal cars, i. e., on tracks laid outside of and parallel and close to the tracks of the complainant would necessarily involve an unlawful *physical interference* with the exercise and enjoyment of the com-

plainant's franchise. It alleged that the operation of municipal cars in the manner stated would *prevent* convenient access to and from complainant's cars and therefore prevent people from boarding those cars and would *deter* prospective passengers from boarding complainant's cars because of the danger of crossing the municipal tracks in front of rapidly approaching municipal cars when boarding or alighting from complainant's cars. The complainant contended that the operation of the municipal cars in the manner authorized by the ordinances would so interfere with the operation of the complainant's cars as to substantially impair the enjoyment of complainant's franchise. The complainant therefore invoked the provisions of the due process clause of the Federal constitution as well as the provision prohibiting the impairment of the obligation of contracts. The complainant also invoked the provisions of the Constitution of California providing that "private property shall not be taken or *damaged* for public use without just compensation having *first* been made to, or paid into court for, the owner.*

The complainant also alleged that the construction of a new municipal railway on streets occupied by the complainant's tracks would violate certain provisions of the charter of the City and County of San Francisco prohibiting the construction of *new* utilities until an effort had been made to acquire *existing* utilities. The complainant in this behalf contended and alleged that the city had not solicited from the com-

* *Cal. Const. of 1879*, Art. I, sec. 14.

plainant offers for the sale of its railway system as required by the charter.

B. NATURE OF CASE AS PROVED.

The evidence upon which the complainant relied below and here relies may now be stated.

Pursuant to authority granted to it by the Legislature of the State of California, the Board of Supervisors of the City and County of San Francisco on September, 15, 1879, granted to Market Street Railway Company of San Francisco (predecessor in interest of the complainant) a franchise to construct, maintain and operate (by animal or cable power) for the term of fifty years, a single or double track street railway along and upon certain streets in San Francisco, including Market Street, the chief artery and thoroughfare of the city's travel. The franchise on Market Street was for the whole length of that street, i. e., from the City Front (later renamed the Embarcadero) to Seventeenth Street, *a distance of more than twenty blocks* (R. 22). On May 29, 1882, the term of this franchise was extended so as to make it run for fifty years from the date of the amendment, instead of from the date of the original franchise (R. 25). On April 15, 1895, the Board of Supervisors of the City and County of San Francisco granted to Market Street Railroad Company, its successors and assigns, a franchise to construct, maintain and operate a single or double track railroad along certain other streets in San Francisco, *including Church Street* (R. 60).

The duration of this franchise was fixed as the unexpired term of the original fifty-year franchise of

September 15, 1879, as amended on May 29, 1882 (R. 61).

Each of these franchises required the grantee to file an acceptance of the franchise within a limited time, which, being done, the franchise "should be taken and deemed to be a contract between" the grantee and the city (R. 63). It also required the grantee to complete the authorized construction within a limited time. Both of these things were done, and for a number of years prior to 1906 the franchises were exercised and cars were operated by cable power. The complainant in 1902 succeeded to the rights of the original franchise-holder, and from that time until 1906 continued to operate a cable railway system along the streets named in the franchises, including Market Street and Church Street. After the earthquake and fire of 1906 the complainant was authorized and directed by an ordinance of the City and County of San Francisco to convert its cable lines into electric lines (R. 276). This the complainant did at a cost admitted to be in excess of $2,500,000 (R. 323). As soon as this change was effected the complainant commenced operating the electric system and has since operated the same (R. 278).

The cars of the complainant operating on Market Street, when they reach their destination at the Ferry Building on the City Front (now called the Embarcadero—the easterly terminus of Market Street, abutting on the western shore of San Francisco Bay) turn on a loop situate largely on property belonging to the State of California, the right to maintain which is dependent

upon a revocable license from the State Board of Harbor Commissioners, in which is vested the government and control of State property at the Ferry (R. 273).

At the time the complainant's franchises were granted Section 499 of the Civil Code of the State of California provided as follows:

> "Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

In addition, the Market Street franchise of September 15, 1879, above mentioned in terms provided that:

> "It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th Section of the Civil Code of this state. This section shall apply to persons and companies as well as corporations."

In 1912 the City and County of San Francisco commenced the construction of a municipally-owned street railway system.

Since November, 1912, the municipality has been operating cars on Market Street from the Embarcadero to the intersection of Kearny, Geary and Market Streets, a distance of *seven* blocks.*

* If the count is made on the south side of Market Street rather than on the north side, the distance would be almost eight blocks (see map R. p. 262).

These municipal cars are operated on tracks laid outside of and parallel to the complainant's tracks, and, by agreement between the complainant and the city, used in common by the municipal cars and certain of the complainant's cars (R. 324).* The cars on the outside tracks turn at the Ferry Building (Embarcadero) on a second or outer loop, operated, also, under a revocable license from the State Board of Harbor Commissioners. By the construction sought to be enjoined in this suit, the municipality proposed to extend its tracks westward along Market Street from Kearny Street, through the most congested retail district, to Seventeenth Street, a distance of fourteen blocks or more.** In similar manner, it purposed to construct tracks on Church Street from the latter's intersection with Market Street (at Fourteenth), thence to Sixteenth Street, a distance of two blocks. The tracks of the municipality, according to the proposed extension of the municipal system, would, therefore parallel the tracks of the complainant for a distance of not less than twenty-one blocks on Market Street and two blocks on Church Street.

* The complainant sued to enjoin the city from operating cars on Market Street from Kearny and Geary to the Embarcadero claiming that such operation would violate the franchise of the complainant which limited the operation of a second railroad to five blocks on any street covered by complainant's franchise. During the pendency of the suit the complainant and the city entered into an agreement in compromise thereof, and for certain advantages thereby acquired, the complainant waived its right to object to the operation of municipal cars on Market Street between Kearny and Geary and the Embarcadero. In the agreement, provision was made for the joint use by the city and the complainant of certain of the complainant's tracks, for a division of the cost of maintenance of tracks, for exchange of transfers and other matters incident to operation (R. 324 et seq.).

** If the count is made on the north side of Market Street, the distance would be greater (see again map, R. 262).

The proposed extension of the municipal system in the manner hereinbefore mentioned has been authorized by two ordinances passed by the Board of Supervisors of the City and County of San Francisco. The first ordinance, passed February 17, 1915, authorized the construction of tracks from Van Ness Avenue along Market Street to Church Street, and thence along the latter street four blocks to Eighteenth Street (R. 151). The second ordinance passed August 17, 1916, authorized the construction of tracks (a) from Twin Peaks (Market at Seventeenth) along Market Street to Church Street, there connecting with the municipal tracks authorized by the first ordinance, and (b) from Van Ness Avenue eastward on Market Street to a connection with the existing municipal tracks on Market Street at Kearny (R. 152). These two ordinances are the laws under which the municipal system is being extended and which the complainant contends impair the obligation of its franchise and the enforcement of which is invalid for this and other reasons. It will be noted that prior to the enactment of the earlier of the two ordinances the city was operating cars on Market Street from Kearny and Geary to the Embarcadero. The first of the ordinances above mentioned authorized the construction of tracks on Market Street between Church and Van Ness Avenue and the second authorized the construction of two additional segments which would make the municipal line continuous on Market Street from Twin Peaks to the Embarcadero. These two segments were (a) from Twin Peaks to Church Street, and (b) from Van Ness Avenue to Kearny and Geary. It will thus be seen that the

city by the items of construction authorized in the two ordinances in connection with the portion of the municipal line from the Embarcadero to Kearny and Geary Streets, in operation since November, 1912, purposed to blanket the cars of the complainant along the whole length of Market Street.

The course and the manner of operation of the proposed municipal line is shown on the map appearing at page 262 of the Record, whereon the complainant's tracks are indicated by solid black lines, and the municipal tracks by broken red lines; the portion of the complainant's system in operation on Market Street prior to the present suit is that extending from Kearny Street eastward to the Ferry Building, and the extension of the municipal system which is the subject of litigation in the present suit, extends from Kearny Street westward to the end of Market Street at Seventeenth Street and an additional line on Church Street extends from the latter's intersection with Market at Fourteenth thence to Sixteenth Street.

Having stated the general nature of the proposed construction of the municipal line and the manner of operation of the municipal cars, we now purpose to show how such construction and operation will affect the operation of the complainant's cars and interfere with the exercise of complainant's franchise.

From the Embarcadero to Seventeenth Street (a distance of twenty-one blocks) the center of Market Street is occupied by the double-track street railroad of the

complainant.* The distance between the complainant's tracks is 6 feet 10 inches; the gauge between the rails is 4 feet 8½ inches (R. 261, 262); the clearance between the cars of the complainant, reduced by the overhanging of the cars, is 34 inches (R. 261). The tracks of the municipality, upon which, prior to the commencement of the present suit, it was operating on Market Street between the Embarcadero and Kearny Street, are *outside of and parallel to the tracks of the complainant.* The gauge between the rails of the municipal track is the same as that of the complainant's track—4 feet 8½ inches. The distance between the outer rail of the complainant's track and the inner rail of the municipal track is 6 feet 4 inches. The clearance between the municipal cars and the complainant's cars, reduced by the overhanging of the cars, is only *22 inches* (R. pp. 261, 262).

Market Street, it may be said, is the chief artery of San Francisco; it passes through the most congested business district and forms itself the most congested retail district in the city. Market Street is intersected upon the north by streets running northerly and southerly and easterly and westerly with the result that each crossing forms a junction of two streets with Market Street (see map, R. p. 262). Complainant's car lines run upon and branch from Market Street and across it to every part of the city. Its easterly terminus is on San Francisco Bay, and most of the overland traffic entering San Francisco finds its way into the city

* Under a provision of the Civil Code, expressly incorporated in its franchise, the complainant was required to construct its tracks "as nearly as possible in the middle" of the street (R. 23; Sec. 498 Civ. Code).

at the easterly end of Market Street (Embarcadero). There, also, all ferry boats carrying passengers on San Francisco Bay converge and make their landings to discharge and receive passengers entering and leaving the city from and to all bay points, but chiefly to points on the easterly side of the bay. The only other inlet or outlet to or from San Francisco by rail or water is the railroad depot of the Southern Pacific Company at Third and Townsend Streets in said city; at the latter point passengers entering and leaving San Francisco are discharged from and received into trains of the railroad company operating in a southerly direction on the peninsula on which San Francisco is situated, and running into and through the southern coast counties of California as well as into the eastern states of the United States by the southern route. Persons entering San Francisco by the Third and Townsend gateway travel (if by street car) on cross-town lines of the complainant and may transfer to the Market Street lines of the complainant when reaching that street. It may be said that practically all persons entering or leaving San Francisco who use street cars and practically all persons living in San Francisco who use street cars in going to or returning from their places of business and other errands, use the Market Street lines during all or some part of their various journeys.* The complainant carries daily upon all its Market Street lines an average of approximately 209,000 passengers, of whom about 51,000 represent passengers transferred from in-

*A map showing the various lines of the complainant and their relation to Market Street appears opposite page 150 of the Record.

tersecting lines of the complainant to its Market Street lines (R. 264). Much of the traffic on Market Street involves a short haul and is quite profitable. By reason of the volume of business on Market Street, and particularly during what may be termed the "rush hours", i.e., between eight and nine o'clock in the morning and five and six o'clock in the afternoon of each day, it is necessary to operate the various lines of the complainant on Market Street on a very short headway, with the result that in the central portion of the city, both east and west of Kearny Street the headway between cars of the complainant is only twenty-four seconds.

Except as otherwise noted the foregoing facts are admitted by the pleadings.

The great volume of traffic on Market Street leads frequently to traffic congestion even under favorable conditions. This congestion, according to complainant's witnesses, is noticeably increased by the operation of the municipal system. Although it does not and cannot object to the operation of municipal cars on Market Street from Kearny and Geary eastward to the Embarcadero, because by agreement with the city it has consented that the city may so operate, the complainant introduced evidence to show that the operation of the city's cars between the points mentioned on tracks outside of and parallel to the tracks of the complainant prevented ingress to and egress from the complainant's cars and prevented or deterred prospective passengers from boarding complainant's cars. It is obvious that the interference with the complainant's franchise consequent upon a paralleling of the complainant's

tracks for *twenty-one* blocks, though like in character to that resulting from a similar operation for *seven* blocks, would differ in intensity to an extent beyond that measured by the ratio between the length of the proposed operation and that already in force. The proposed extension of the municipal system would result in a greater number of municipal cars and a consequent shortening of the headway between those cars. The result would be that the interference with the operation of the complainant's cars would be greatly intensified, even in the seven blocks between the Embarcadero and Geary and Kearny Streets. The result of the operation of the municipal cars outside of and parallel to those of the complainant between Kearny Street and the Embarcadero may be best stated by reference to the testimony of some of the witnesses for the complainant, who testified in respect of the matter.

Mr. Von Phul, vice president and general manager of the complainant, testified as follows:

> "I have noticed several cases at different points on Market Street where there are traffic officers stationed and where there have been delays from one cause or another, accident or otherwise, the cars banked up one behind the other. Since I have been investigating the delays on Market Street I have seen the cars banked practically from Steuart Street up to the Palace Hotel, (between New Montgomery and Third Street). [a distance of 6½ blocks]. That would be due to an interruption across the track blocking the traffic. The banking up would be on both of the inbound tracks, but of course would be more noticeable on the inner track than on the outer track because of the greater number of cars on the inner track. I have noticed, but of course not to the same extent, the

banking up at different places where there are traffic officers stationed when the Market Street traffic has to halt while the other traffic crosses. When I have noticed the banking up of cars where there are four tracks and two lines of cars abreast of each other, passengers alighting from the car on the center track at times have to get off between that car and the car on the outer track. With respect to passengers getting on the cars on the center tracks the same conditions prevail, that is, they have to pass, if a car is on the outer track, between the cars to get around and enter the cars on the inner track. I have seen persons attempt to get on cars on the inner track and get out of the cars on the inner track under such conditions. Very many are nervous and afraid of the dangerous condition existing in such a situation. There is always danger in a condition of that kind, liability to accidents requiring great care both in the operation of the cars, and on the part of the person trying to board or leave the cars. It is also dangerous for persons to attempt to get on or off a standing car on the inner track where there are moving cars on the outer track. At different times I have observed people attempting to avoid moving cars in trying to get on and off United Railroad cars on the center tracks. I have observed that particularly just below Montgomery Street. There is a safety station at Montgomery Street. I have noticed passengers endeavoring to get from the safety station across the tracks and into the cars on the center tracks, particularly when the car on the outer track was moving. They would start, stop, come back, wait, and sometimes miss the car on the inner track. With cars on the outer track persons would have to go around the car on the outer track in order to get to the car on the inner track.

"The condition I have just described at Montgomery Street, I think is a general one wherever there are four tracks. It is my observation that all points on Market Street where there are four tracks, people endeavoring to get on or off the United Rail-

road cars are in difficulty and are in danger from the cars operating on the outer track. I think that condition would affect the business of the United Railroads at such points. I think it would have an effect both on the cost of operation of the road, and on the earning power of the road, assuming that the four tracks extend out Market Street. It would increase the difficulty of operation, it would require probably a slower operation and speed on Market Street, a greater number of cars to give the same headway service which is now given. All that would be necessary. The condition would operate in decreasing the revenue because the cars operated on the outer track would serve the same territories as the cars on the inner track, and the people that were bound for those territories would take the outer cars probably in preference to the inner ones, due to the danger of crossing over the outer tracks" (R. 258-259).

John T. Pidwell, a San Francisco attorney, told of his experience as follows:

"When I leave my office in the Mills Building, about five o'clock in the evening, to reach my home it is necessary for me to take the Haight Street car, if I am going on the United Railroad cars. When I reach the safety station near the junction of Montgomery and Market, *I have often found, or always found, that the Haight Street car would be blocked; it would be almost impossible for us to board the Haight Street car on account of the many Municipal cars that come on the track closer to the safety station. Many times I have missed a car, and in a hurry I have taken a jitney to reach my home promptly. I have noticed many young ladies who desired to board the United Railroad cars at that place that seemed to be panic-stricken when they found the municipal cars approach and did not seem to even stop. I have seen many other persons daily having the same difficulty that I experienced. The difficulty that I have observed that people have*

of getting on the United Railroad cars is the rule rather than the exception. I know that I myself have been deterred from taking those cars, and have given up the attempt'' (R. 265-266).

Henry T. Jones, general superintendent of the United Railroads, speaking of a banking of cars at Kearny and Market Streets, testified as follows:

"It is a common occurrence to see at least six cars standing there waiting, during the rush hours and frequently in the daytime, too. I have had occasion to watch passengers getting on and off the cars at different stopping places between Kearny Street and the Ferry. *It is almost impossible at times for passengers to get to the inner cars at all. I have frequently been on Market Street when a car on the inner track has been waiting there and a car on the outer track will run up on that car and scatter the people like a lot of wild sheep. I have frequently seen people, in order to get on and off a car, get between the cars that are standing there. It is a very dangerous position and it depends on the size of the man or woman whether he or she can stand there or not.*

"With reference to people endeavoring to get on and off cars at safety-stations where there are four tracks, at times it is practically impossible. Take Montgomery Street for instance. A car will come up and stop on the inner track. Persons go to get on that inner car and another car on the outer track will come up and scare the people and they cannot go on, although the car on the outer track is supposed to stop ten feet ahead of the car on the inner track. By the time the passengers get around there is another car on the outer track coming up and it blankets them there and it is impossible for them to get on. It is a frequent condition at such a safety station as Montgomery, or any other safety station, to see two cars standing on the outer track, one behind the other. In such a case, people lose their car entirely. Their car goes away and loses

them. They have to wait for another. This condition is a very common one. I see it several times a day. Anyone can go down there and see the same condition."

* * * * * *

"If the proposed track should be built out Market Street cutting various intersecting tracks of the United Railroads, it would cause great delay in the operation of the complainant's cars and more congestion of traffic. It would most assuredly increase the danger in the operation of the cars. I think it would make more likely an increased number of accidents. It would be bound to increase the danger of collision between cars at the crossing places.

"I have frequently noticed instances where people endeavoring to get to the United Railroads' cars would give up the job. It is a common occurrence—a daily occurrence. I have seen as many as five trying to get on a car and probably one or two would get on and the others would run away because of a car on the outer track coming up and blanketing them. I have had numerous complaints from people about that condition in getting on and off the complainant's cars. It has been a common occurrence to receive such complaints" (R. 267, 268, 269).

The condition described by the witnesses appeared to the trial judge to be so obvious that he requested a curtailment of the evidence upon the subject, saying:

"* * * you might, it seems to me, practically agree on all sides obviously *that convenient access to the inner car is interfered with if you permit the outer car to lie alongside of the inner car; that is a self-evident proposition"* (R. 264).

This observation of the court induced the following colloquy between the court and counsel:

"Mr. CANNON. And I think it is just as obvious if the outside car is moving that there is interference in getting to the cars.

"The COURT. These are questions, of course that may only become relevant as bearing on the question of whether or not the city has or has not the power to authorize the occupancy of the street or the way in the street by additional cars, and that comes back, to the question of the construction of the power of the city; of course I think it is perfectly plain that the case is not to be decided upon the question of the latitude of convenience that there might be unless the inconvenience is so great that to permit it to continue would be in effect confiscation of property.

"Mr. CANNON. Or under our constitution, damage to property, which uses that term.

"The COURT. I should think you could curtail a great deal of this; it does not need any argument, for instance, or the testimony of witnesses, to show that that thing which is self-evident must happen; that if you have got an inner car and an outer car and a man wants to take the inner car, it is quite inconvenient for him to do it; I should say that obviously there would be greater traffic on the outer car by persons desiring to go shorter distances upon a street occupied by four cars unless the traffic is so regulated that he thinks that he can just as conveniently step across the outer track and take the inner car. I do not think argument will be necessary on that.

"Mr. CANNON. We take the same view, your Honor.

"The COURT. So that you may curtail a great deal of this, by permitting your record to contain a few statements of that kind.

"Mr. CANNON. It was only offered, if your Honor please, because the city, while admitting the physical condition, denied that it had any such effect, so in order to be on the safe side we thought we would introduce evidence as to what the facts are.

"Mr. HAVEN. The court has described what seemed to it to be obvious, and it seems to us to be obvious, and I am perfectly willing to stipulate what the fact is" (R. 264, 265).

The testimony which provoked the colloquy between counsel and court was directed to the effect of the operation of municipal cars outside of and parallel to those of the complainant for seven blocks; that is, from Kearny Street eastward to the Embarcadero.* By the construction and operation which the complainant sought to enjoin in the present suit, the defendants purposed to extend their lines for a distance of fourteen additional blocks on Market Street, thereby necessarily increasing the number of cars, decreasing the headway between the cars, and augmenting and intensifying the conditions which the witnesses, with respect to the more limited operation, had described as preventing free access to the complainant's cars and depriving the complainant of patronage because of the dangers incident to crossing the outer tracks to the cars of the complainant in front of rapidly approaching municipal cars.

The complainant had in court other witnesses to testify to the effect upon the complainant's franchise of the operation of municipal cars on tracks parallel to and outside of the complainant's tracks.

Counsel for the complainant stated to the court that such witnesses were in attendance but that he would not

* As previously stated, the complainant does not object to the operation of defendants' cars on Market Street between Kearny and Geary and the Embarcadero. The complainant introduced evidence concerning the effect of such operation to show how and to what extent the operation of complainant's cars would be interfered with and the enjoyment of its franchise impaired by the proposed extension of the municipal line from Kearny Street to Seventeenth Street.

call them out of deference to the court's view that testimony with reference to the inaccessibility of the complainant's cars and the danger of access to them caused by the municipal cars was proof of the "obvious" and the "self-evident". The following occurred:

> "Mr. CANNON. If your Honor please, I have several other witnesses here who will give testimony along the line that Mr. Pidwell gave, but I do not like to call them in view of your Honor's statement as to what might be considered obvious.
>
> "The COURT. I should think it would not be necessary to call them.
>
> "Mr. CANNON. Very well, we will not call them in view of your Honor's suggestion" (R. 273).

The character of the blanketing of complainant's cars by the municipal cars to which the witnesses for the complainant referred is well illustrated by the photographs appearing at the Record opposite pages 294 and 296, all of which show municipal cars on the outer track, not only preventing convenient access to the complainant's cars on the inner track, but almost preventing even a view of those cars.

In addition to its claim that the manner of operation of defendants' cars would unlawfully interfere with the enjoyment of its franchise, without regard to whether the franchise was exclusive or not, the complainant also contended that its franchise was exclusive for all over five blocks on any street covered thereby and that for this additional reason the guaranties of the constitutional provisions, state and federal, above mentioned, were available to it. This contention of the complainant was based upon a statute of California, expressly incorporated in its franchise, which prohibited the

"occupation and use" of any street by two railroad corporations for more than five blocks.*

The effect of the proposed municipal construction sought to be enjoined by the complainant, in addition to interfering with safe and convenient access to the cars of the complainant, was described by Mr. Von Phul, the vice president and general manager of the complainant, as follows:

> "I am familiar with the various crossings from the foot of Market Street clear out to Fifteenth and Castro Streets. If the proposed municipal line should be constructed outside of the center tracks and across all of these various tracks intersecting and crossing Market Street, I think that the same condition would exist at the various crossing points as now exists at Market and 3rd Streets. The difficulty of operating the complainant's cars would be largely increased and the cars would bank up at these crossings proportionately on account of the cars having to cross in two ways. I think such congestion would delay the operation of the complainant's cars under the present schedule. I do not think that the cars could be operated as rapidly and as economically if the crossings were made. It would be necessary to have more cars if the speed was decreased in order to maintain the same headway as now. Additional cars would involve additional expense and involve other difficulties in the operation on Market Street. It would mean that the cars would be that much more numerous on Market Street, causing greater congestion at these different points. If two additional tracks should be constructed by the defendants, the same conditions would prevail on Market Street southwesterly from Geary Street as now prevail on Market Street between Geary and the Ferry" (R. 259).

* *Cal. Civ. Code*, Sec. 499.

Mr. Jones, general superintendent of the complainant, testified to the same effect (R. 268).

The complainant also alleged that the defendants purposed to cut the rails and cross the tracks of the complainant at various points without paying the complainant for the easement thus appropriated as required by California statutes,* and without making compensation for the injury to the complainant's franchise which would result from the interruption of traffic on complainant's tracks, the increased cost of operation of complainant's cars caused thereby and the curtailment of the full enjoyment of the complainant's franchise consequent thereon.

The complainant also claimed that the city had failed to comply with certain provisions of the San Francisco charter requiring solicitation of offers for the *sale of existing* utilities before proceeding with the *original construction* of a like utility. The evidence relating to this contention of the complainant is set forth and discussed in the portion of the brief dealing with the claim itself.

Assignment of Errors.

The appellant relies upon all the assignments of error set forth in the Record at pages 335-339. These assignments, variously expressed, may be said to sum up the following as the particulars in which the appellant claims that the decree appealed from is erroneous.

* *Cal. Civ. Code*, secs. 469, 500.

1: Said decree is erroneous in that it permits the impairment of the complainant's contract (i. e. its franchise) by the proposed municipal action.

2: Said decree is erroneous in that it permits the complainant to be deprived of property without due process of law.

3: Said decree is erroneous in that it permits the "taking" of the property of the complainant (i. e. its franchise) without compensation being first paid.

4: Said decree is erroneous in that it permits the "damaging" of the property of the complainant (i. e. its franchise) without compensation being first paid.

5: Said decree is erroneous in that it permits the construction of a new public utility by the municipality without any attempt by the municipality to purchase the complainant's system, as required by Section 2, Article XII of the Charter of the City and County of San Francisco.

Argument.

I.

THE COMPLAINANT'S FRANCHISE CONSTITUTES AN IRREVOCABLE CONTRACT, THE OBLIGATION OF WHICH WILL BE IMPAIRED BY THE PROPOSED MUNICIPAL ACTION.

A. The complainant's franchise is an irrevocable contract.

Authorities in support of the proposition stated in the heading might be multiplied *ad infinitum*. It is un-

necessary, however, to do more than cite a few of the cases.

See:

Grand Trunk Co. v. South Bend (1913), 227 U. S. 544; 57 L. ed. 633 (reversing 174 Ind. 203; 89 N. E. 885);

Boise Water Co. v. Boise City (1913), 230 U. S. 58; 57 L. ed. 1389;

Russell v. Sebastian (1914), 233 U. S. 195; 58 L. ed. 912;

Cleveland v. Cleveland Ry. Co. (1903), 194 U. S. 517, 533; 48 L. ed. 1102, 1108;

Fletcher v. Peck (1810), 6 Cranch, 87; 3 L. ed. 162;

People v. O'Brien (1888), 111 N. Y. 1; 18 N. E. 692;

Citizens' R. Co. v. City Ry. Co. (1893, C. C., Ind.), 56 Fed. 746. (Affirmed 166 U. S. 557; 41 L. ed. 114 [1897]);

Africa v. Mayor (1895, C. C., E. D. Tenn.), 70 Fed. 729, 733-734;

Cleveland Ry. Co. v. Cleveland (1899, C. C., N. D. Ohio), 94 Fed. 385;

Mercantile Trust Co. v. Collins Park R. Co. (1900, C. C., N. D. Ga.), 101 Fed. 347;

Vincennes v. Vincennes Traction Co. (1918 New York), 120 N. E. 27;

People v. New York Ry. Co. (1918 New York), 120 N. E. 155.

See, also:

Interurban Ry. Co. v. Public Utilities Commission (1918 Ohio), 120 N. E. 831,

citing numerous cases.

B. The complainant's franchise vested the complainant with an easement or right-of-way in the streets covered by the franchise, which easement or right-of-way is "property" under the protection of the constitutional guaranties.

The complainant's franchise being a contract, it is desirable to ascertain what *property* rights were thereby vested in the complainant in the streets covered by the franchise. It is a well-settled rule in California, and, we may add, elsewhere, that a street railway company authorized by statute to construct tracks on a city street acquires an easement in the portion of the street between its tracks which constitutes real property, and as such is entitled to protection.

In *Appeal of the North Beach & Mission R. R. Co.* (1867), 32 Cal. 500, the syllabus reads as follows:

> "The interest in the street of a street railroad company authorized by statute to lay down a track in the streets of a city and run cars over it for the conveyance of passengers for hire, *is an easement in the land; and the estate of such company in the street is real property.*"

In the body of the opinion it is said (p. 512):

> "* * * it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode

prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement became themselves a part of the land—of the estate of the company—and that, in those States where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate in the same manner, and upon the same principles, as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it. The interest is local—fixed to the particular land, the particular street—and cannot be enjoyed beyond or independent of that fixed locality. It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and *the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to the full extent of that estate, is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy his estate.* The several estates are substantially of the same kind, and are of equal dignity before the law, but one is larger, more extensive than the other. Practically, they differ only in the quantity of interest, not in quality."

And at page 513 it is said:

> *"Whatever change in any particular street, therefore, will increase or diminish the travel in its cars, must, directly, in the same ratio, increase or diminish the value of its easement—its estate in the particular street in which the change is made, and upon which such increase or diminution depends."*

The foregoing case is cited and approved in

Los Angeles Co. v. Hubbard (1911), 17 Cal. App. 646; 121 Pac. 306.

In *O'Sullivan v. Griffith* (1908), 153 Cal. 505; 95 Pac. 873, the court said:

> "The right to use the streets of a city as a way upon which to build and operate a street railroad is a right in real property, an incorporeal hereditament." (95 Pac. 874.)

See, also:

Stockton Gas. Co. v. San Joaquin Co. (1905), 148 Cal. 313; 83 Pac. 54;

South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579; 93 Pac. 490;

Matter of Russell (1912), 163 Cal. 668, 679; 126 Pac. 875, 879.

Ex Russell vs Sebastian 233 U.S. 195

Elsewhere the authorities are to the same effect.

In *Hamilton Traction Co. v. Hamilton Transit Co.* (1904), 69 Ohio St. 402; 69 N. E. 991, the court, speaking of the right acquired by a street railroad corporation through a franchise to use the city streets, says:

> "The right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public." (69 N. E. 994.)

In *Peoria Ry. Co. v. Peoria Terminal Co.* (1911), 252 Ill. 73; 96 N. E. 689, it is held that:

> "Where a street railway company by ordinance is granted the right to construct a railway system

for a definite period over certain streets, it thereby acquires the exclusive right to that portion of the streets granted to it for railway purposes during the term of the grant" (syllabus).

In *Lake Shore Ry. v. Cincinnati Ry.* (1876), 30 Ohio St. 604, the court, speaking of the right of a street railroad in the city street, said (p. 614):

> "This property, as distinguished from the franchise to be a corporation, and to maintain and operate a railroad over it, under the charter, is held by the same tenure as that of all other railroads, and its owner is entitled to compensation for its appropriation, the same as an individual."

See, also:

Lake Shore Ry. Co. v. Chicago R. Co. (1881), 100 Ill. 21;

Chicago R. R. Co. v. Englewood Ry. Co. (1886), 115 Ill. 375;

Chicago R. R. Co. v. Chicago & St. Louis R. R. Co. (1884), 15 Ill. App. 587;

Memphis R. Co. v. Birmingham Ry. Co. (1892), 96 Ala. 571; 11 So. 642.

Birmingham Traction Co. v. Birmingham Ry. Co. (1898), 119 Ala. 129; 24 So. 368;

Mobile R. Co. v. Louisville R. Co. (1915); 192 Ala. 136; 68 So. 905;

The principle declared in the foregoing cases is, as we have stated, settled law, and, as we shall hereafter show, is recognized and applied in the statutory provisions of California.

So much for the interest in the street itself, acquired by the complainant through its franchise. Other rights

no less certain and even more valuable were acquired by the complainant—rights arising from the very nature of the franchise.

C. The franchise of the complainant secured to the complainant a right of reasonably safe and convenient access to its cars which right could not be destroyed or substantially impaired without impairing the obligation of the franchise.

The franchise of the complainant was a right to construct tracks and to operate cars upon the streets covered by the franchise, to receive and carry passengers on such cars, and to charge for the service so rendered. These elements of the franchise are also *"property"* and entitled to protection to the same extent as any other species of property. This proposition is elementary.

See, however:

Spring Valley Water Works v. Schottler (1882), 62 Cal. 69;

Gulf Railroad Co. v. Hewes (1901), 183 U. S. 66; 46 L. ed. 86;

Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049.

The *right* in the grantee of a franchise to carry passengers necessarily implies a correlative *duty* on the part of the grantor to refrain from doing anything that will *physically interfere* with the exercise and enjoyment of the right granted. It implies a *duty* upon the part of the grantor to refrain from any *physical interference* with the franchise which will prevent or deter the public from patronizing the grantee of the franchise.

> "Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers necessary to the full use and beneficial enjoyment of the grant; and where such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement."
>
> *Commonwealth v. Temple* (1859), 14 Gray 69, 77 (per Shaw, C. J.).

A street railway franchise, therefore, necessarily includes reasonably safe and convenient access to cars operating under the franchise. It is patronage that gives substance and value to a franchise. Patronage, in turn, is dependent upon the ability of the public to make use of the utility. A grant of a street railway franchise with a reserved right to prevent the use of the street cars by the public would be a legal solecism. The franchise of the complainant carried with it, therefore, a right of access to its cars. This right of access is a property right inhering in the franchise and entitled to protection to the same extent. It is part and parcel of the franchise.

In *Williams v. Los Angeles Ry. Co.* (1907), 150 Cal. 592; 89 Pac. 330, the court enumerates the easements appurtenant to property abutting upon public streets, and among them includes "the right of ingress and egress to and from the lot over and by means of the adjacent portion of the street", citing many cases.

In *Eachus v. Los Angeles Ry. Co.* (1894), 103 Cal. 614; 37 Pac. 750, the court says (103 Cal. 617):

> "The right of the owner of a city lot to the use of the street adjacent thereto is *property* which

cannot be taken from him for public use without compensation;" • • •

And, again (p. 618):

"*Such easement is a right of property incident to the lot itself,* and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he had the fee in the street or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief."

To the same effect see:

Ford v. Santa Cruz R. R. Co. (1881), 59 Cal. 290;

Bigelow v. Ballerino (1886), 111 Cal. 559; 44 Pac. 307;

Smith v. Southern Pacific R. R. Co. (1905), 146 Cal. 164; 79 Pac. 868;

Cushing-Wetmore Co. v. Gray (1907), 152 Cal 118; 92 Pac. 70;

Coats v. Railway Co. (1905), 1 Cal. App. 441; 82 Pac. 640;

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.), 169 Pac. 388;

Partridge v. Richmond (1918, Cal. Ct. App.), 172 Pac. 166.

In passing it may be observed that the rule announced in these California cases in respect of the *property* right of access, constitutes the rule of decision in this court.

Guffey v. Smith (1915), 237 U. S. 101; 59 L. ed. 856 and cases cited.

D. The operation of the municipal cars in the manner proposed will impair the obligation of the complainant's franchise.

The complainant contends that its franchise vested it with rights which are exclusive except for five blocks. This contention will be discussed later.

But the impairment of the complainant's franchise that will follow from the operation of the municipal cars *in the manner proposed* i. e. upon tracks outside of and parallel to the tracks of the complainant arises, quite regardless whether the complainant's rights are exclusive or not. As shown by the witnesses for the complainant the operation of municipal cars on tracks outside of and parallel and close to the tracks of the complainant will *prevent* many people from riding on the complainant's cars and *deter* many others from doing so. The operation of the municipal cars, therefore, will impair the free exercise and enjoyment of the complainant's franchise by physically interfering with such exercise and enjoyment.

In *Ninth Avenue R. R. Co. v. N. Y. Elevated R. R. Co.* (1877), 3 Abbott's New Cas. 347, the court held that the plaintiff not having an exclusive franchise could not enjoin competition by a second franchise-holder. The court, however, was careful to note that (p. 395):

> "The alleged appropriation or invasion of any part of the plaintiffs' road is expressly negatived by the finding that the running of defendants' cars and engines upon the Sixth avenue over plaintiffs' road, in case the defendants' road were constructed, would not prevent the practical running of plaintiffs' cars by horses, or materially increase the expense of such running."

Speaking of the damage suffered by the plaintiff through a loss of patronage, the court further said (p. 396):

> "Such special damage results from no interference on the part of the defendant with either the franchise or tracks of the plaintiff."

In *Piatt v. Covington Company* (1871), 71 Ky. 31, the owners of a ferry franchise sought to recover damages from a bridge company "for injury to their property, and loss sustained in their custom and business, in consequence of the erection of" a bridge. The Supreme Court of Kentucky affirmed a judgment in favor of the defendant upon the ground that (p. 37):

> "* * * where the construction of a bridge will interpose no *physical obstruction to the enjoyment of a ferry franchise* across the same river, the owners of the ferry are not entitled to compensation for any incidental impairment of the profits of their ferry resulting merely from the use of the bridge instead of the ferry by the public."

Further in the opinion the court said (p. 38):

> "It does not appear that the ferry-landing of the appellants was necessarily affected or obstructed by the erection of the bridge;"

In *Rutland Electric Light Co. v. Marble City Electric Co.* (1893), 65 Vt. 377; 26 Atl. 635, the court held that an electric light company was entitled to a decree restraining a later company "from maintaining its wires so as to interfere with those of the 'plaintiff' ". The court in its opinion styles as "plain" the proposition that the

> "defendant's rights were subordinate to the orator's, and must be exercised in such a manner as not to interfere with them"

notwithstanding that the orator had no exclusive rights under its franchise.

It should be borne in mind that the complainant and the municipality in operating rival street railway systems are serving the same public use, and the complainant, by reason of its priority of right, is entitled to protection against the city, which cannot draw upon its *governmental* powers to enlarge the scope or operation of its *proprietary* rights.

> *Los Angeles Gas Co. v. Los Angeles* (1917, S. D. Cal. S. D.) 241 Fed. 912.

and see

> *Moore v. New Orleans Water-Works Co.* (1902, C. C. E. D. La.); 114 Fed. 380.

Snidow v. Board of Supervisors (1918 Va.), 96 S. E. 810, was a suit by the owners of a ferry franchise against the Board of Supervisors to prevent the establishment of a bridge. The case involved, among others, the question whether the ferry franchise was exclusive. The court held that it was not, and said (p. 815):

> "The erection and operation of the bridge is not an infringement of the ferry franchise, and does not render the owner or operator of the bridge liable in damages to the owner of the ferry, although the practical effect of the operation of the bridge may be to draw away all custom from the ferry, so as to wholly destroy the value of the ferry franchise."

The court further held, however, that the rule stated was subject to the qualification that the bridge "does not physically obstruct the approach to or operation of the ferry".

Further in the opinion it is said (p. 818):

> "Should the actual construction of the approach to the bridge physically obstruct the public road approach to either the eastern or western ferry landing of appellants, and no other reasonably equally convenient public road approach or approaches thereto be provided, so as to prevent such obstruction, the proceedings in the instant cause will furnish no bar against the appellants in the future asserting, in such a proceeding as may be authorized by law, their right to operate their ferry free from physical obstruction to its approaches, or to the recovery of proper damages for any injury which may be occasioned by such obstruction."

In *15 Am. & Eng. Ency. of Law* (2d ed.) 1049, the rule is thus stated:

> "The obligation of the contract implied in a grant will be impaired by a legislative attempt to revoke the grant or by the imposition of subsequent *burdens* or conditions on the *use or enjoyment* of the property, right, or franchise granted."

In *Booth on Street Railways* (2d ed.), the author says (p. 200):

> "While a prior occupant, in the lawful enjoyment of its franchise, will not be heard to object on the ground of an apprehended or actual loss or diminution of profits arising from a division of its patronage with a second company, cases may arise where it would be entitled to protection against an invasion of its rights under color of the exercise of legislative or police powers. *Either parallel lines or crossings might be so located or constructed as*

to prevent or materially impair the use of tracks laid under an earlier grant. This would not be damnum absque injuria."

In *Nellis on Street Railways* (2nd ed.) Vol. 1, the author, after discussing the right of a municipal corporation to grant a second street railway franchise in a street over which another franchise has been granted, says (p. 147):

> "But the grant to operate a street railroad in a particular street prevents the common council from authorizing any other company *to use such street in any way destroying, hindering or embarrassing the use under the former franchise."* citing
>
> *City Ry. Co. v. Citizens' Street R. Co.* (1897), 166 U. S. 557; 41 L. ed. 1114;
>
> *Fidelity Trust Co. v. Mobile St. R. Co.* (1892, C. C., S. D. Ala.), 53 Fed. 687.

The case last cited was a suit for an injunction by the receiver of a street railway company against a second street railway company. It appeared that during the progress of the receivership proceedings an ordinance had been passed by the city of Mobile allowing the defendant to lay its tracks for five blocks *partly within and partly without the rails of the first company.* The first company sued to enjoin such construction. No contention was made that the first company had an exclusive franchise. In granting the injunction the court, among other things, said (p. 688):

> "The grant to the Mobile Street Railway Company, in its own nature, amounts to an extinguishment of the right of the grantors, and implies a contract not to reassert that right; and said railway

> company should be protected from impairment of its privileges and franchises under such grant by any attempt to appropriate or interfere with the same for the use of the Mobile Electric Railway Company; and *if the use proposed to be made by the Mobile Electric Railway Company of the roadbed or track of the Mobile Street Railway Company obstructs, hinders, or embarrasses the use and usefulness of that part of the first acquired right which is in actual use by the receiver, it would be an illegal use, and should be prohibited.*"

A similar case is *Hamilton Traction Co. v. Hamilton Transit Co.* (1904), 69 Ohio St. 402; 69 N. E. 991, the holder of a *non-exclusive* railway franchise in the City of Hamilton, Ohio, was held entitled to enjoin the straddling of its tracks by the holder of a later franchise. The Supreme Court of Ohio held that to permit such construction would (a) impair the obligation of the plaintiff's franchise; and (b) "take" its property without due process of law.

Speaking of the rights of the plaintiff under its non-exclusive franchise, the court says:

> "* * * it has the right, during the life of the grant, to the possession and enjoyment of that franchise and easement without *interruption or obstruction* from any other company, until such time, at least, as it may voluntarily surrender the same, or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and laws of the state of Ohio." (69 N. E. 993.)

See, also:

Hot Springs Co. v. Hot Springs (1902), 70 Ark. 300; 67 S. W. 761-762;

Vallejo Ferry Co. v. Vallejo (1905), 146 Cal. 392; 80 Pac. 514.

The latter case was a suit to restrain the trustees of the City of Vallejo from constructing a wharf along the waterfront of that city in such manner as to injure or destroy an existing ferry franchise. The court found that the wharf, as contemplated, would extend beyond the ferry-slip of the complainant, and, further, that if constructed according to proposed plans, it would

> "extend in front of the entrance of said slip and * * * interfere with and prevent free ingress and egress of said ferry-boats of plaintiff to and from said ferry-slip last mentioned, and * * * obstruct the use by said plaintiff of said ferry-slip."

The court also found that the proposed wharf would *interfere* in other particulars with the exercise of the ferry franchise, and therefore decreed that the defendants must modify their plans in the manner designated by the decree so as not to interfere with the exercise and enjoyment of the plaintiff's franchise. The City of Vallejo appealed from the decree. Its contention is thus stated in the opinion of the Supreme Court:

> "Appellants claim that the city has the right to build a wharf at the point proposed; that in passing the ordinance in pursuance of this right the city necessarily and conclusively determined that there existed a public necessity for the wharf, and that it was therefore no infringement of any right vested in plaintiff, but that it is plaintiff's duty and is its only right to adjust its means of enjoying its franchise to the needs of the city for the new wharf." (146 Cal. 396.)

Said the court:

> "It cannot be doubted that the city has the right to construct a wharf at Virginia-Street water-front

(sec. 34, Charter of the City—Stats. 1899, p. 381), and it may be admitted that the necessity for establishing the wharf was determined by the ordinance authorizing its construction. *But this does not mean that the city may in the exercise of such right interfere to the extent of destroying rights vested in others by the city, and that, too, without pretense of compensation.*" (146 Cal. 397.)

Speaking of the charter right of the City of Vallejo to build a wharf, the court quotes with approval from the earlier case of *San Pedro v. Southern Pacific R. R. Co.* (1894), 101 Cal. 333; 35 Pac. 993, as follows:

> "The authority given in this section [a charter provision similar to that in the Vallejo charter] does not, however, clothe the plaintiff with an absolute right to construct a wharf at any point on its water-front which it may select, irrespective of the rights of others; *but is intended to confer upon it the same authority to do the acts therein enumerated which a natural person would possess.*
> * * *

Continuing, the court said:

> "The claim that if the rights of plaintiff and defendants conflict the right of the municipality must prevail cannot be sustained in the present case." (146 Cal. 397.)

Accordingly the decree of the trial court was affirmed, thereby compelling the City of Vallejo to construct its wharf in such manner as not to interfere with the free exercise and enjoyment of the plaintiff's ferry franchise by preventing convenient ingress and egress to and from its ferry-slip.

The foregoing cases clearly illustrate the difference between the exercise of a second franchise which les-

sens the emoluments of a first franchise *but does not interfere with the exercise of the first,* and operation under a second franchise *in such manner as to physically interfere with the exercise* of a first franchise. If the second franchise *does not interfere with the exercise of the earlier franchise,* the obligation of the earlier franchise is not impaired, no matter to what extent its emoluments may be lessened or its value reduced by reason of the exercise of the second franchise. If the exercise of a second franchise *does interfere with the exercise of an earlier franchise,* the obligation of the earlier franchise is impaired. The grantor of a non-exclusive franchise does not warrant that it will not, either by itself or others, exercise a second franchise that will lessen the emoluments of an earlier franchise; it does, in effect, warrant that it will not by itself or others *interfere with, or prevent the exercise of the earlier franchise.*

The case is not unlike the warranty implied in the sale of the good-will of a business. The rule is universal that upon such a sale the vendor impliedly warrants that he will not by direct solicitation endeavor to withdraw from the vendee the patronage which constituted the good-will. Unless the vendor *expressly* covenants not to do so, he may freely *compete* with his vendee, and the loss of patronage which the vendee suffers through competition is *damnum absque injuria.* But although he may *compete,* the vendor may not, by solicitation or other direct means, endeavor to regain the patronage which made up the good-will that he sold. The reason for this rule is thus expressed in the leading case of

Trego v. Hunt (1896), L. R. App. Cas. 7, as follows (p. 25):

> "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

This case is cited with approval in *Ferris v. Pett* (1919 R. I.) 105 Atl. 369).

See, also:

Hilton v. Hilton (1918 N. J.), 104 Atl. 375, citing cases from other jurisdictions to the same effect as *Trego v. Hunt.*

> "Competition, an honest, healthy competition, is productive of good. The law affords no aid to that kind of competition which claims the right to crush a competitor, to advance a rival interest."
>
> *The Central City Horse Railway Company, etc. v. The Fort Clark Horse Railway Company* (1876), 81 Ill. 523, 529.

This rule applies to a municipal corporation to the same extent that it applies to a private individual or corporation.

See, again:

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.) 241 Fed. 912.

The evidence in the Record clearly brings the case of the complainant within the principle just discussed. The complainant, by its franchise, acquired the right to have access to its cars remain reasonably safe and convenient. It was entitled to exercise and enjoy its franchise *without physical interference* from the grantor of the franchise. Particularly was it entitled to have the streets upon which its cars were operating unobstructed by any public improvement that would so interfere with the operation of its cars as to prevent safe ingress to and egress from the cars and thus prevent or deter prospective passengers from riding on them. The evidence in the Record shows that the construction authorized by the city will both *prevent* and *deter* prospective passengers from riding on the complainant's cars. When cars of the city are banked upon the outer track, one behind the other, access to the cars of the complainant on the inner track is impossible. On the other hand, many members of the public will be *deterred* from riding on the complainant's cars because of the necessity of crossing the city's tracks in front of rapidly approaching municipal cars in order to board or alight from the complainant's cars.

E. The complainant's franchise is an exclusive one as we shall later show and for this additional reason the ordinances complained of impair the obligation of complainant's franchise.

The complainant contends that its franchise is exclusive for all exceeding five blocks on any street covered thereby. This contention will be later discussed.

It is obvious, of course, that if the contention be correct, it follows necessarily that the operation of the municipal line will impair the obligation of the complainant's franchise.

Chenango Bridge Co. v. Binghampton Bridge Co. (1866), 3 Wall. 51; 18 L. ed. 137;

Walla Walla v. Walla Walla Water Co. (1898), 172 U. S. 1; 43 L. ed. 341 (affirming 60 Fed. 957);

New Orleans Water-Works Co. v. St. Tammany Water-Works Co. (1882), 14 Fed. 194 (affirmed 120 U. S. 64; 30 L. ed. 563 (1887).

See, also:

Monett Co. v. Monett (1911, C. C. Mo.), 186 Fed. 360;

Mason v. Harper's Ferry Bridge Co. (1879), 17 W. Va. 396.

II.

THE PROPOSED MUNICIPAL ACTION WILL (A) "DEPRIVE" THE COMPLAINANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE CONSTITUTION OF THE UNITED STATES, AND (B) "TAKE" THE PROPERTY OF THE COMPLAINANT WITHOUT JUST COMPENSATION, CONTRARY TO THE CONSTITUTION OF CALIFORNIA.

The Constitution of California, in Section 14 of Article I thereof, provides that:

> "Private property shall not be *taken* or damaged for public use without just compensation having first been made to or paid into court for * * * the owner."

It has been held by this court that the due process clause of the federal constitution prohibits the "taking" of private property for public use without just compensation.

Chicago Co. v. Chicago (1897), 166 U. S. 226; 41 L. ed. 979;

Norwood v. Baker (1898), 172 U. S. 269; 43 L. ed. 443.

This being so, a "taking" of private property for public use, without just compensation, will violate the provision of the California Constitution above quoted, and will also violate the "due process" clause of the federal constitution.

A. The complainant's franchise is exclusive and for this reason the proposed municipal action involves a taking of complainant's property contrary to the constitutional guaranties.

The complainant contends that its franchise is exclusive for all over five blocks. This feature of the case is discussed in a later subdivision of the brief.

Of course, if the complainant's franchise is exclusive, any action of the city which will reduce the emoluments of the franchise will "deprive" the complainant of property without due process of law.

See:

Newburyport Water Co. v. Newburyport (1900 Mass.), 103 Fed. 584 (citing many cases).

B. The operation of the municipal cars on tracks parallel to those of the complainant will, by preventing access to the complainant's cars, violate the constitutional guaranty against the "taking" of property without regard to whether complainant's franchise is exclusive or not.

Even though the franchise of the complainant is not exclusive the threatened municipal action will nevertheless "take" the property of the complainant by destroying or impairing the "property" right of access to complainant's cars which is the very life of its franchise.

> "To constitute a taking of property it is not necessary that there should be an exclusive appropriation, a total assumption of possession, or an absolute and total conversion of the entire property. One of the valuable incidents of absolute property is the right of the user. * * * Hence any serious abridgment or interruption of the common and necessary use of property may amount in law to a taking, and entitle the owner to compensation. 'A partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree. The quantum of interest may vary, but the principle is the same.' Wood's Railway Law, section 231."
>
> *Hamilton Traction Co. v. Hamilton Transit Co.* (1904), 69 Ohio St. 402; 69 N. E. 991, 994.

In *1 Lewis on Eminent Domain* (2d ed.) Sec. 56, it is said (p. 58):

> "If property, then, consists, not in tangible things themselves, but in certain rights in and

> appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be *taken*, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property, is, pro tanto, *taken*, and he is entitled to compensation."

The foregoing was quoted with approval in

Pacific Telephone Co. v. Eshleman (1913), 166 Cal. 640, 665; 137 Pac. 1119, 1127.

In the latter case the Supreme Court of California held that an order of the Railroad Commission of that State requiring a telephone company to make physical connection of its lines with those of a competitor, was a "taking" of property within the inhibition of the Federal Constitution and the Constitution of California.

In *Belleville v. Turnpike Co.* (1908), 234 Ill. 428; 84 N. E. 1049, the court speaking of the property right of a turnpike company under its franchise, says that the interest, whether denominated a franchise or an easement, is a valuable property right, the practical destruction of which would be the "taking" of property within the constitution, and also that an interference with such an interest may constitute a "taking" *pro tanto*, which will entitle the owner to compensation. Further the court says:

> "Private property forbidden by the Constitution to be taken or damaged for public use without just

> compensation is not limited to the tangible subject-matter or corpus of the property, *but includes the right of user and enjoyment of it.* When such rights are destroyed or taken for public use their owner is entitled to compensation" (84 N. E. 1051).

In *2 Tiedeman "State and Federal Control of Persons and Property"*, Sec. 143, the author says (p. 707):

> "It has been very generally held that the proprietors of adjoining property have, as an easement over the land used as a highway, the right to the free and unobstructed use of the street, and any interference with such use was a *taking* of property, for which compensation had to be made."

In many cases it has been held that "property" is *taken* when access to property is cut off or impaired. It is true that the cases are not uniform in their holding upon this subject. In some jurisdictions it is held that depriving the owner of a right of access to property is not a "taking" but a "damaging" of property. Many of the cases upon this subject are collected in a note to the case of *Ranson v. Sault Ste. Marie,* 15 L. R. A., N. S. 1, where the annotator declares that the preponderance as well as the weight of authority favors the rule that wherever a right of access to property is held to be "property" itself, the cutting off or impairment of such access is a "taking" of property. In the note on the subject the author sums up the argument in favor of the view that property is "taken" when access to it is cut off or impaired, as follows:

> "The sum of the advantages accruing from holding the title to a parcel of land makes up its value

> and this value is property, the destruction of any portion of which by actively preventing its enjoyment by physical obstruction is a *taking* of property; and, when the public needs require such destruction, there arises the condition which the Constitution was designed to prevent, the taking of private property for public benefit. It is obviously immaterial that this destruction is of the means of access to a parcel of land, because the means of access is property, and *its destruction a taking*, as surely as would be the destruction of a building on the land for some purpose necessary to the public welfare." (15 L. R. A. N. S. 56.)

In *Dana v. The Rock Creek Company* (1896), 7 App. Cas. D. C. 482, access to private property was materially impaired by the construction of a railroad. The owner claimed damages upon the ground that his property had been "taken". The court, after discussing cases arising in other jurisdictions under constitutional guaranties that property should not be "taken" or "damaged" for public use without just compensation, said (p. 496):

> " • • • under our reading of our federal constitution we are unable to perceive any reasonable or substantial distinction between the taking of private property by the actual physical invasion of it and the deprivation of the owner's use of it by acts that amount to the destruction or impairment of that use. The construction of an impassable barrier around property by which the owner's access to it would be destroyed, would, to our common understanding, be no less a taking of it in the sense of our Constitution than would be the owner's expulsion from the premises."

See, also, *Central Trust Co. v. Hennen* (1898, C. C. A. 6th), 90 Fed. 593, holding, per Clark, D. J., that if a complainant owned a right-of-way over land

> "a direct, permanent injury to, or the destruction of, such right of ingress and egress, would, to the extent of the damage actually sustained, be the *taking* of private property for public use." (p. 597)

It appeared in the case just quoted that access to private property had been cut off by the construction of a railroad, and the views of Judge Clark were concurred in by Circuit Judges Taft and Lurton.

In *Foster Lumber Co. v. Arkansas Ry. Co.* (1908), 20 Okla. 583; 95 Pac. 224, the court held that property was "taken" within the meaning of the constitutional guaranty when access to property was cut off or materially interrupted by the building of a street railroad track. In reaching this conclusion the court said:

> "The decisions of the courts made under statute or constitutional provision to the effect that the complaining party can recover only where there is a 'taking of private property for public use' are nearly uniform on the question that, where the injury complained of by the abutting property owner is one that is common to the general public, such injury is *damnum absque injuria.* The decisions of the courts, however, are by no means uniform upon what constitutes a 'taking' of property in cases similar to the one at bar, but we believe the weight of the better authorities, if not the greater in number, is that such a 'taking' may result without conversion of the property or any part thereof, as under statutes and constitutional provisions which provide that private property shall not be taken for public use without compensation." (95 Pac. 226.)

In the opinion numerous cases are cited, among others the leading case of *Pumpelly v. Green Bay Co.* (1872), 13 Wall. 166; 20 L. ed. 557, concerning which the Oklahoma court says (95 Pac. 227):

> " * * * the reasoning of the court in that case is that the test by which it may be determined whether there has been a 'taking' is not the manner in which the injury was done, but whether one's common and necessary use of his property has been seriously interrupted."

In *Pumpelly v. Green Bay Co.*, supra, in holding that property had been "taken" when the owner had been deprived of its beneficial use, this court said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (20 L. ed. 560.)

We submit that the construction of a moving barrier on Market Street outside of the tracks of the complainant, making access to the complainant's cars always dangerous and frequently impossible, is such an impairment of the property right of access as constitutes

a "taking" of complainant's property. In so arguing we are not unmindful that in *Omaha Horse Ry. Co. v. Cable Tramway Co.* (1897, C. C. Neb.), 30 Fed. 324, it was held that the operation of street cars on tracks outside of and parallel to those of another company would not "take" the property of the first company in violation of the federal constitution, although it would "damage" that property in violation of the constitution of Nebraska. We shall deal later with the latter aspect of this case.

Nor are we unmindful of the fact that this court in *Meyer v. Richmond* (1898), 172 U. S. 82; 43 L. ed. 374, held that cutting off a right of access was not a "deprivation" of property within the meaning of the constitutional provision. The latter case, however, is not authority against our contention because it was based upon decisions of Virginia limiting the property right of abutting owners in the city streets which were held to constitute a rule of decision binding upon this court because they determined rights in property under the law of Virginia. In California, however, as we have already shown, it is clearly recognized that a right of access to property is itself "property". Necessarily, therefore, a destruction or impairment of access is a destruction or impairment of "property" so as to constitute a *deprivation* or *taking* of property.

III.

THE PROPOSED MUNICIPAL ACTION WILL "DAMAGE" THE PROPERTY OF THE COMPLAINANT WITHOUT "JUST COMPENSATION HAVING FIRST BEEN MADE" AS REQUIRED BY THE CONSTITUTION OF CALIFORNIA.

In September, 1879, when the complainant acquired its franchise on Market Street, here involved, the California Constitution of 1849 was still in force. This Constitution, prohibited the "taking" of private property for public use without just compensation. In 1879, however, California adopted a new Constitution which, in so far as it related to anything except the election of officers provided for therein, took effect on January 1, 1880 (Sec. 12, Art. XXII Cal. Const. of 1879). The new Constitution in Section 14 of Article I provided that

> "private property shall not be taken or *damaged* for public use without just compensation having *first* been made to or paid into court for the owner".

This provision has remained in force since its original enactment. On January 1, 1880, therefore, there was annexed to private property a new right, i. e., the right of immunity from "damage" except upon the payment of just compensation.

A. The constitutional provision guaranteeing immunity of private property from "damage" except upon payment of compensation was intended to create a right in private property which did not previously exist.

The reasons that led to the enactment of the provision in the California Constitution against "damaging"

of private property for public use without compensation and to the enactment of similar constitutional provisions in other states are historical and require but brief comment. They are well discussed in the leading case of *Chicago v. Taylor* (1887), 125 U. S. 98; 31 L. ed. 638. Suffice it to say, as was said in the case just cited that the purpose of the amendment was to give "greater security to private rights by giving relief in cases of hardship not covered by the preceding constitution" and that:

> "The new rule of civil conduct, introduced by the present Constitution, * * * required compensation in all cases where it appeared 'there has been some physical disturbance of a *right*, either public or private, which the plaintiff enjoys *in connection with his property*, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.'" (31 L. ed. 641.)

See, also:

Rigney v. Chicago (1882), 102 Ill. 64;

Reardon v. San Francisco (1885), 66 Cal. 492; 6 Pac. 317;

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750;

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.); 169 Pac. 388;

Williams v. Meridian Ry. Co. (1915), 110 Miss. 174; 69 So. 596;

Hot Springs Ry. Co. v. Williamson (1885), 45 Ark. 429. Affirmed 136 U.S. 121

The case last cited contains an interesting discussion of the right of an owner to access to property, the nature of that right, and the reasons that led to the enactment of constitutional provisions prohibiting the "damaging" of property without compensation.

The purpose of the constitutional amendment being to give "greater security to private rights", the amendment should be liberally construed to carry out its beneficent purpose.

In *Boyd v. U. S.* (1885), 116 U. S. 616; 29 L. ed. 746, this court, through Mr. Justice Bradley, said:

> "* * * constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." (29 L. ed. 752.)

As pointed out in the discussion of a previous proposition, the courts of the country were divided on the question whether an interference with property which did not constitute a physical invasion of it amounted to a "taking" prohibited by constitutional provisions.

The cases in which the question most frequently arose were those where the right of access to property was cut off or impaired by a public improvement. In those jurisdictions where (overlooking the fact that a right of access to property is an easement, and therefore property), it was held that a destruction or impairment of access was not a "taking" of property; the owner of property had

no remedy. It was in order to avoid this result and to make the public, generally, pay for such injuries as were inflicted upon private property in the interest of the public that the various state constitutions were amended so as to prohibit the "damaging" of property for public use without compensation. The complainant and the municipality, in operating rival lines of street railway, are serving the same public use and the complainant, by reason of its priority of right, is entitled to protection against the city, which cannot draw upon its *governmental* powers to enlarge the scope of its *proprietary* rights.

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal., S. D.); 241 Fed. 912;

and see,

Moore v. New Orleans Water-works Co., (1902, C. C. E. D. La.); 114 Fed. 380.

Whatever may be said in favor of cases that hold that property is not "taken" though access thereto is impaired or destroyed it is clear that a constitutional provision prohibiting the "damaging" of property for public use requires payment of compensation to the owner of property where right of access to his property has been cut off or impaired by a public improvement. Such is the uniform holding of the cases. In California the question has frequently arisen since the adoption of the Constitution of 1879 and invariably compensation has been awarded to the owner of the property, access to which has been obstructed or impaired.

See:

Ford v. Santa Cruz R. Co. (1881), 59 Cal. 290;

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750;

Smith v. Southern Pacific R. R. Co. (1905), 146 Cal. 164; 79 Pac. 868;

Williams v. Los Angeles Ry. Co. (1907), 150 Cal. 592; 89 Pac. 330;

Cushing-Wetmore Co. v. Gray (1907), 152 Cal. 118; 92 Pac. 70;

Coats v. Atchison Ry. Co. (1905), 1 Cal. App. 441; 82 Pac. 640;

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.); 169 Pac. 388;

Partridge v. City of Richmond (1918, Cal. App. Ct.); 172 Pac. 166.

In an earlier part of the brief quotation was made from some of the foregoing cases showing that the right of an owner to compensation for an interruption of obstruction of the right of access to his property is based upon the ground that a right of access to property is "property" itself, within the protection of the Constitution.

In numerous cases in other jurisdictions it has been held similarly that a right of access to property is "property" within the protection of a constitutional provision against "damaging" property without compensation to the owner.

See:

Vincent Bros. v. New York R. Co. (1904), 77 Conn. 431; 59 Atl. 491;

Mayor v. Wing (1901), 113 Ga. 90; 38 S. E. 392;

Mayor v. Henderson (1913), 12 Ga. App. 120; 76 S. E. 1034;

Lake Erie & Western R. Co. v. Scott (1890), 132 Ill. 429; 24 N. E. 78;

Longenecker v. Wichita Light Co. (1909), 80 Kan. 413; 102 Pac. 492;

Camden Ry. Co. v. Stein (1906), 30 Ky. L. 140; 97 S. W. 394;

Adams v. Railway Co. (1888), 39 Minn. 286; 39 N. W. 629;

Lamm v. Railway Co. (1890), 45 Minn. 71; 47 N. W. 455;

Stuhl v. Northern Ry. Co. (1917), 136 Minn, 158; 161 N. W. 501;

Slaughter v. Meridian Light Co. (1909), 95 Miss. 251; 48 So. 1040;

Morris v. Covington (1919, Miss.); 80 So. 337;

Missouri Pac. Ry. Co. v. Porter (1892), 112 Mo. 361; 20 S. W. 568;

Foudry v. St. Louis R. Co. (1908), 130 Mo. App. 104; 109 S. W. 80;

Robinson v. Springfield Ry. Co. (1910) 143 Mo. App. 270; 126 S. W. 994;

Omaha v. Kramer (1889), 25 Neb. 489; 41 N. W. 295;

Jaynes v. Omaha Ry. Co. (1898), 53 Neb. 631; 74 N. W. 67;

Stehr v. Mason City Ry. Co. (1906), 77 Neb. 641; 110 N. W. 701;

Gillespie v. So. Omaha (1907), 79 Neb. 441; 112 N. W. 582;

Crawford v. Marion (1910), 154 N. C. 73; 69 S. E. 763;

Foster Lumber Co. v. Arkansas Ry. Co. (1908), 20 Okla. 583; 95 Pac. 224;

McQuaid v. Portland Ry. Co. (1889), 18 Ore. 237; 22 Pac. 899;

Western Pennsylvania R. Co. v. Hill (1867), 56 Pa. St. 460;

Pittsburg Ry. Co. v. Vance (1887), 115 Pa. St. 325; 8 Atl. 764;

Iron City Co. v. Pittsburg (1916), 253 Pa. 478; 98 Atl. 679, 685;

Pennsylvania R. Co. v. Walsh (1889), 124 Pa. 544; 17 Atl. 186;

Block v. Salt Lake Co. (1893), 9 Utah 31; 33 Pac. 229;

State v. Superior Court (1901), 26 Wash. 278; 66 Pac. 385;

State v. Superior Court (1902), 30 Wash. 219; 70 Pac. 484;

Idaho R. Co. v. Nagle (1911 C. C. A. 9th), 184 Fed. 598;

Quinby v. Cleveland (1911 C. C. N. D. Ohio), 191 Fed. 68.

In *U. S. v. Grizzard* (1911), 219 U. S. 180; 55 L. ed. 165, part of a farm was appropriated by the federal government through permanently flooding it in the course of the construction of a public improvement. By the same improvement, a portion of the highway was also permanently flooded, thereby cutting off the access which the owner of the farm had to a turnpike. It

was held that, for the deprivation of the right of access to the turnpike, the owner of the farm was entitled to damages. Said Mr. Justice Lurton:

> "The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice." (55 L. ed. 167.)

In *Omaha v. Kramer, supra,* the court held that compensation must be paid to the owner of property whose right of access thereto was impaired by the construction of a viaduct on the street.

Said the court (p. 296):

> "It is not within the scope of the authority of the law-making department of the government to take the property of A. and give it to B., even if B. has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B. to damage or destroy the property of A. without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case, all the property is taken, while in the other it is taken only to the extent that it is

diminished in value; and in either case the owner is entitled to be compensated for his loss."

Further in the opinion the court said (p. 296):

"Constitutional guaranties are of little avail, unless carried out in the spirit in which they were framed, and no plea of public benefit should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition. If the public desire to erect works for public use, then the public—the party benefited—must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of indebtedness or expense, and thus the burdens are equalized."

These cases show that under a constitutional provision against "damaging" private property without compensation the owner of property is entitled to damages whenever convenient access to his property is cut off or impaired.

B. The loss of patronage that will result to the complainant through the difficulty and danger of access to its cars by reason of the operation of the city's cars on municipal tracks between the complainant's tracks and the sidewalk is directly within the constitutional prohibition against "damaging" property without compensation "first" paid.

The evidence in the record in the present case demonstrates that the operation of the municipal cars renders access to the complainant's cars dangerous always and frequently impossible.

It will not do to say that regulations will remedy these evils as was argued by the defendants in the trial court and held by the trial judge (239 Fed. 997; R.

192). Regulations, no matter how stringent, yield to psychology. Passengers desiring to board the complainant's cars will not cross the outer tracks in front of rapidly approaching municipal cars because forsooth they know of a regulation under which the municipal cars will stop two, five or ten feet from them. They will not hazard the chance of injury particularly when from a variety of reasons such as defective brakes, slippery tracks and the negligence of motormen municipal cars may get beyond the control of "regulations". The evils and dangers to passengers consequent upon the operation of the municipal cars were recognized by the trial court as "obvious" and for this reason proof upon the subject was not multiplied as it might have been. Indeed, the subject is one of which the court will take judicial notice. It is a matter of common knowledge that the conditions which the witnesses for the complainant described will inevitably damage the complainant's franchise by *preventing* prospective passengers from boarding the complainant's cars or by *deterring* them from attempting so to do. The instinct of self-preservation will *deter* prospective passengers from crossing in front of rapidly approaching municipal cars to board the cars of the complainant. Human beings are not automatons and no amount of "regulation" will remove the fear of one who has to cross a railroad track in front of a rapidly approaching car in order to board a car of the complainant. Of this fact and of the general propensities of mankind no proof is required for this court is as much alive to them as the generality of mankind.

In *Ho Ah Kow v. Nunan* (1890, C. C. Cal.), 12 Fed. Cas. 252, Judge Field tersely and clearly expresses the principle as follows (p. 255):

> " * * * we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men."

In *Louisville Trust Co. v. Louisville Ry. Co.* (1899), 174 U. S. 674; 43 L. ed. 1130, Mr. Justice Brewer, speaking for the court, said (43 L. ed. 1134):

> "We may not shut our eyes to any facts of common knowledge,"

and again (p. 1136):

> "Human nature is something whose action can never be ignored in the courts."

The first of the observations of Justice Brewer were quoted with approval in *St. Louis Ry. Co. v. McElvain* (1918, E. D. Mo.), 253 Fed. 123, 133.

See also:

Cederberg v. Robison (1893), 100 Cal. 93, 96; 34 Pac. 625;

Butler v. Ashworth (1894), 102 Cal. 663; 36 Pac. 922.

In *Vincent Bros. v. New York R. Co.* (1904), 77 Conn. 431; 59 Atl. 491, the plaintiffs suffered a loss of patronage through an interruption of access to their property caused by a public improvement. The charter of the defendant required it to "pay all damages that may arise to any person or persons whose real estate shall be taken or *injured.*" The court held that

where premises are used for manufacturing or business purposes and "the owner is making such a use of the land, it is that use of which he is temporarily deprived, and for the loss of or injury to which he is entitled to compensation." The court therefore held:

> "In determining the diminution of such value the court should consider the reasonably necessary loss to the plaintiffs in their said business, caused by such interruption of access, including actual loss of trade and loss of profits necessarily caused thereby." (59 Atl. 496.)

In *Western Pennsylvania R. Co. v. Hill* (1857), 56 Pa. St. 460, the defendant company constructed its road through lands of Hill and condemned a right-of-way therefor.

The trial court included in the award of damage an item for loss of business to a mill due to the danger to customers because of the proximity of the railroad. The defendant appealed. The question in the case is thus stated in the opinion of the Supreme Court of Pennsylvania:

> "Many witnesses testified that the plaintiffs owned an ancient custom mill; that after the railroad was built and begun to be operated, they ceased to carry their grain to be ground there, and that at least one-half of their custom had fallen off. The reason given for this was simply the danger in going to the mill with horses and teams, owing to the location of the railroad with reference to the mill. * * *
>
> In the opinion of the witnesses this presented a case of such peril and inconvenience in frightening teams and horses, as to compel them and others to carry their grain to be ground at other mills. If this resulted as an immediate and direct

consequence of the taking of the plaintiffs' property, on which to build the railroad, and if the fear and danger in the circumstances of the case were reasonable, and prevented people from coming to the mill, the court advised the jury that the depreciation in the value of the property, therefore, ought to be compensated by the railroad company." (p. 464.)

In affirming the judgment of the trial court, the Supreme Court of Pennsylvania said:

"It is not necessary to elaborate much the nature of the injury here, or its direct character. It results solely from the taking a portion of the plaintiffs' land, and the construction and use of the defendants' road. I see not much difference in the nature and certainty of the exclusion of the customers of this mill, between an absolute physical obstruction, directly in their way, and others which continually threaten their lives and limbs in the use of the ordinary means of getting there. Without enlarging, however, we think the testimony in regard to the loss of custom to the mill, from the construction of the road over the ground of the owner, and the reason for it, were properly received and properly submitted to the jury as grounds of compensation to be made to the plaintiffs, for the deterioration of their property." (p. 465.)

A similar case is *Pittsburgh Ry. Co. v. Vance* (1887), 115 Pa. St. 325; 8 Atl. 764, dealing with the propriety of an award of damages for loss of patronage due to danger of access to a mill. Says the court:

"The court was clearly correct, however, in admitting evidence to show how the trade or custom of the mill was affected by the construction of the railroad; that, by reason of the proximity of the railroad to the mill, it was inconvenient and dangerous for persons with teams and wagons going

to and from it; and that the effect of this was to decrease or to destroy the business and custom of the mill, and consequently to lessen its value. If the peril and inconvenience to customers from this cause was such that they were thereby induced to carry their grain to be ground to other mills, and the plaintiff's land was thereby depreciated, the taking of the plaintiff's property, and the construction of the railroad thereon, were the direct and immediate cause of this injury." (8 Atl. 767.)

To the same effect see:

Pennsylvania R. Co. v. Walsh (1889), 124 Pa. 544; 17 Atl. 186;

Iron City Co. v. Pittsburgh (1916), 253 Pa. St. 478; 98 Atl. 679.

In *Foudry v. St. Louis Ry. Co.* (1908), 130 Mo. App. 104; 109 S. W. 80, the plaintiff was the owner of property abutting on a street and sought an injunction and damages against the defendant because of the construction of a railroad in the street which she claimed would cut off access to her property. The holding of the court, in so far as pertinent here, is summarized in two of the syllabi as follows:

"A railway in a street is unlawful if it prevents the use of the street for traffic and travel or prevents access to private property, since access is in itself a property right."

"In determining whether a railway company's tracks interfere with travel and traffic on a street so as to warrant an injunction, the population and business volume of the city, proximity and convenience of other streets, and environments should be considered, and, while even a considerable hindrance or inconvenience to travel and traffic will not necessarily make the occupation of a street by

> a railway company unlawful, the monopoly of the street by the company need not go to the extent of rendering passage by teams and vehicles impossible, and if the tracks so far engross a street that the public will forego the use of it rather than encounter the danger and difficulty of using it, injunction will lie."

In the opinion it is said:

> "The tracks must not so far engross a street that the public will forego the use of it rather than encounter the danger and difficulty of using it." (109 S. W. 83.)

The matter just quoted sums up pithily the argument of the complainant in this connection. If access to the complainant's cars is made so dangerous by the operation of the municipal cars that prospective passengers will "forego the use" of complainant's cars "rather than encounter the danger and difficulty of using" them, the complainant is entitled to damages for the loss of patronage so caused.

With respect to the "damage" that will be caused by the danger from municipal cars and the consequent deterring of prospective passengers of the complainant, see:

> *Allentown Turnpike Co. v. Lehigh Valley Traction Co.* (1896), 174 Pa. St. 273; 34 Atl. 565.

In this case the railway company entered upon and used a part of the road of the Turnpike Company by laying a double track and running its cars thereon. This use was subject to a statutory duty to make compensation therefor to the owners of the turnpike. The parties, however, were unable to agree as to the amount

of the compensation and a jury was appointed to assess the damages. From the award of the jury an appeal was taken to the Court of Common Pleas and thereafter to the Supreme Court upon exceptions to the rulings of the former court with respect to the measure of damages. The contentions of the parties are thus stated in the opinion:

> "The defendant's contention is that it is liable only for the damage caused by the laying of the tracks, and not for the loss of profits resulting from the diminution of tolls, and that the full measure of damages is the additional expense which the plaintiff has incurred, or may hereafter incur, in keeping its roadway in repair by reason of the tracks being laid upon it. The contention of the plaintiffs is that it is entitled to recover compensation for all losses which are the direct and immediate result of the act of the defendant in taking possession of a portion of the road, and laying its tracks and running its cars thereon, and that the measure of damages is the difference in value of the property of the turnpike company, as a whole, before and after the construction of the railway." (34 Atl. 565.)

The judge of the Court of Common Pleas adopted substantially the plaintiff's view, excluding, however, from the computation of damages the loss of revenue due to the *mere competition* of the railroad company.

In the opinion of the Supreme Court it is said:

> "The compensation secured by the act is compensation for the occupation and use of the property of the turnpike company by the railway company, and it includes all injury done to the property which is the immediate and direct consequence of the occupation and use. The damage is not measured by the additional cost of maintenance of

> the roadway only, but by the depreciation in value of the property as a whole, resulting from the occupation and use, and caused by the presence of the tracks and cars. *If these were such a menace to travel as to cause those who would otherwise have driven on the road to abandon its use in whole or in part, they directly affected its earning capacity, diminished its revenue, and depreciated its value as a property.*" (34 Atl. 566.)

The foregoing language is quite pertinent in the present case. Paraphrasing the last sentence quoted above, it can truly be said that municipal cars operating on tracks interposed between the complainant's tracks and the sidewalk will be "such a menace to travel as to cause those who would otherwise have ridden on the complainant's cars to cease to do so wholly or partly, thereby directly affecting their earning capacity, diminishing their revenue and depreciating their value as a property".

A case precisely similar to the present case is

> *Omaha Horse Ry. Co. v. Cable Tramway Co.* (1887, C. C. Neb. per Brewer C. J.), 30 Fed. 324.

The facts of the case briefly stated were as follows:

A *horse car* company, claiming to have an *exclusive* franchise in the City of Omaha, sought in the federal court for the district of Nebraska to enjoin a *cable* company, which was laying tracks parallel to those of the horse car company. It was claimed by the complainant that (1) it had an *exclusive* franchise, the obligation of which would be impaired by the proposed cable line; (2) such franchise would be "taken" by the proposed cable

line contrary to law; and (3) the proposed cable line would *"damage"* such franchise without compensation, contrary to the provisions of the Constitution of the State of Nebraska.

The cause was heard by the late Mr. Justice Brewer, then circuit judge, and is reported twice, first in 30 Fed. at page 324; secondly, in 32 Fed. at page 727.

The first volume reports the decision of the court upon final hearing. The court held that the plaintiff did not have an *exclusive* franchise *except for the operation of horse* cars. It further held that such franchise would not be "taken" *in the constitutional sense* by the operation of the proposed cable line. It did hold, however, that the plaintiff's franchise would be "damaged" by the proposed cable line and particularly by the proposed manner of operation on tracks outside of and parallel to the tracks of the plaintiff. Accordingly commissioners were appointed by the court to assess the damages that would result to the complainant. In making this reference, Judge Brewer said:

> "I do not mean that the plaintiff is entitled to compensation for any injury which may result from *the mere fact of competition,* but there are at least two matters which are clearly proper matters of consideration in estimating the plaintiff's damage: First, the inconvenience and annoyance which results from the crossing of the plaintiff's tracks by the track of the defendant; second, *the interruption of access to plaintiff's cars by the track and cars of defendant between its tracks and the sidewalk."* (30 Fed. 332.)

> *the ordinary passage-way of foot passengers, impairs more or less access to plaintiff's cars. It is a direct hindrance and injury to accessibility thereto. Why should this hindrance and injury be not a legitimate element of damages, upon the same principle that controls in the illustrations cited? That a right is given defendant to lay its track does not destroy the fact of the injury, does not deprive plaintiff of a right to compensation, any more than the right acquired by the railroad company to construct its track in the cases cited.* If it be said that running a line of omnibuses would operate in the same way, I reply that that is an ordinary use of the streets, open to all, and requiring no special permission; there is no appropriation to any public use; it is only a matter of increased travel. But a railroad track is a new use; perhaps not such a one as requires compensation to the adjoining lot-owners, but one special, not free to all, and acquired only through the direct assent of the public authorities" (32 Fed. 733).*

As held by Judge Brewer in the case just reviewed, the operation of cars on tracks between the sidewalk and the tracks of another railroad, is bound to interfere with the exercise of the latter's franchise; it is inevitable that ingress and egress to and from its cars be interfered with. Necessarily, therefore, the operation

* Both parties appealed to this court from the final decree. Later, however, both appeals were dismissed upon stipulation.
See:
Omaha Horse Ry. Co. v. Cable Tramway Co. (1890), 140 U. S. 674; 35 L. ed. 600;
Cable Tramway Co. v. Omaha Horse Ry. Co. (1890), 140 U. S. 692; 35 L. ed. 600.

In the interim between the final decree and the dismissal of the appeals therefrom, the complainant filed a supplemental bill seeking additional damages. A demurrer to this bill was sustained for want of jurisdiction.
See:
Omaha Horse Ry. Co. v. Cable Tramway Co. (1888, C. C. Neb.), 33 Fed. 689. The litigation terminated with the dismissal of the appeals from the final decree.

of cars in such manner "damages" the franchise of the railroad operating on the inner tracks.

In many cases the principle has been recognized that the construction of a public work *longitudinally* along the right-of-way of a railroad must inevitably interfere with the operation of the railroad. Even in jurisdictions where it is held that a street-crossing constructed *across* a railroad right-of-way does not increase the burden on the right-of-way, or create an additional servitude thereon as to entitle the railroad to *substantial* damages, it has nevertheless been held that the opening of a street *longitudinally* along the right-of-way does necessarily increase the burden of the right-of-way and interfere with the operation of the railroad so as to require an award of substantial damages to the railroad company.

See:

Los Angeles v. Allen (1917), 32 Cal. App. 553; 163 Pac. 697;

Los Angeles v. Zeller (1917), 176 Cal. 194; 167 Pac. 849.

The interference with access to the complainant's cars which will result from the operation of the municipal cars stands upon a different footing from the interference with access that arises from ordinary vehicular travel upon the street. The authorities make a clear distinction between the exercise of those privileges which are of common right, such as the use of city streets by pedestrians and private vehicles, and the use of the street by a street railroad. The latter use of a street is

not enjoyed as of right but requires a sovereign grant to make it lawful.

See:

McPhee v. Union Pacific R. Co. (1907, C. C. A. 8th), 158 Fed. 5;

Elizabeth v. Banks (1909), 150 N. C. 407; 64 S. E. 189.

See, also, for this distinction:

Omaha Horse Ry. Co. v. Cable Tramway Co. (1887, C. C. Neb.), 32 Fed. 727, 732 (quoted supra).

As further illustrating this distinction, see:

Tidewater Ry. Co. v. Shartzer (1907), 107 Va. 562; 59 S. E. 407.

The case last cited was a condemnation suit. The particular question involved was whether the "damages", which a public service corporation exercising eminent domain was required to pay under a constitutional provision against the "damaging" of property without compensation, were limited to that class of damage for which a private individual would be liable in the use of his own property. In holding that such was not the measure of damages, the court said (p. 409):

> "It is contended on the part of plaintiff in error that 'the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words "or damaged" mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be

caused by the physical invasion of property or an interference with some right, public or private appurtenant to the property.'

"To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, 'so use your own property as not to injure the rights of another.' Broom's Leg. Max. (7th Ed.), p. 364.

"But in the case before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its 'inability to agree on terms of purchase with those entitled' to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised."

To the same effect see:

Omaha v. Kramer (1889), 25 Neb. 492; 41 N. W. 295;

Lake Erie Co. v. Scott (1890), 132 Ill. 429; 24 N. E. 78.

In the latter case the court said:

" * * * appellant's proposition that 'a corporation is not liable unless an individual doing the same thing on his private property would be' as applied to this case, is not sound. An individual cannot legally take or damage private property for public use, but a railroad company can lawfully do either, if in so doing it makes compensation."

To the same effect is:

Woodbury v. Beverly (1891), 153 Mass. 245; 26 N. E. 851.

The distinction expressed by the foregoing authorities is that between the exercise of a *private* right and the operation of a public utility. A person exercising a *private* right is not liable for mere consequential damages which result to another from the exercise of that right. Such also was the rule in many cases in respect of public rights prior to the enactment of constitutional provisions prohibiting the "damaging" of private property for public use without compensation. Since the inclusion of such provisions in the state constitutions a public or quasi-public corporation exercising a public right is liable to a private individual for consequential damage caused by the exercise of the public right.

See again:

Chicago v. Taylor (1888), 125 U. S. 161; 31 L. ed. 638;

Mason City R. Co. v. Wolf (1906, C. C. A. 8th), 148 Fed. 961.

A constitutional provision prohibiting the "damaging" of private property for public use

> "means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which, for the benefit of the public, private property is damaged."
>
> *Lake Erie R. Co. v. Scott* (1890), 132 Ill. 429; 24 N. E. 78.

IV.

THE COMPLAINANT'S FRANCHISE IS EXCLUSIVE FOR ALL EXCEEDING FIVE BLOCKS ON ANY STREET INCLUDED IN ITS FRANCHISE AND THE OPERATION OF MUNICIPAL CARS FOR MORE THAN FIVE BLOCKS ON ANY SUCH STREET WILL VIOLATE COMPLAINANT'S FRANCHISE.

We now purpose to show that the complainant's franchise is exclusive for all in excess of five blocks on any street covered thereby.

A. The franchise of the complainant, by express provision, prohibits the city from operating a railroad for more than five blocks on any street covered by the complainant's franchise.

The franchise here involved provides as follows:

> "Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation and no more the right to use either of the aforesaid streets for a distance of five blocks and no more, *upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies as well as corporations*" (R. 23).

Section 499 of the Civil Code of California, referred to in the franchise, in 1879, provided as follows:

> "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

It will be noted that the franchise incorporated by reference the provisions of Section 499 of the Civil

Code. The City of San Francisco bound itself not to allow another street railroad for more than five blocks on any street covered by the complainant's franchise. The provision of the franchise is broad. It is directed against corporations, companies and individuals. The city directed the prohibition against every person, natural and corporate. We believe and shall later argue that without express inclusion in the franchise of the complainant the statute itself would have insured to the complainant rights which would be, *pro tanto*, exclusive. The city, in granting the complainant's franchise, made assurance doubly sure by *expressly* incorporating the statutory provisions. The city provided that it should be "lawful for the Board of Supervisors" to permit a second street railroad upon the same street for five blocks. This necessarily meant that it would be *unlawful* for the Board of Supervisors to permit a second railroad for more than five blocks.

The city, therefore, covenanted with the complainant that it would not permit a second railroad upon the streets covered by the complainant's franchise except for five blocks.

In the trial court the defendants contended and the trial court held that the term "corporation" in the franchise did not include a "municipal corporation" (Record 189; 239 Fed. 993). It is clear, however, that the term in the franchise was intended to mean precisely what was meant by the same term in the statute since the franchise expressly incorporated the provisions of the statute. We shall later show that the term "railroad corporations" in the statute includes

and was meant to include a municipal corporation operating a street railroad. In this connection we shall have occasion later to analyze the case of *Knoxville Water Co. v. Knoxville* (1906), 200 U. S. 22; 50 L. ed. 353, relied upon by the defendants. At the moment, however, it should be observed that the city in its franchise was careful to covenant against permitting the existence of a second street railroad owned by "persons" or "companies" or "corporations". It is evident that the city's purpose was to prohibit a second railroad for more than five blocks without regard to the ownership. The provisions of the franchise were directed against the existence of a second road. The important thing was the prohibition of two street railroads on the same street for more than five blocks and not the personality of the owner of the second railroad. We submit, therefore, that under the above-quoted provision of its franchise the complainant acquired rights in the city streets which were *pro tanto* exclusive and which will be violated by the operation of municipal cars on those streets *for more than five blocks.*

See:

Brewster v. Kitchell, 1 Salk 198; 91 Eng. Rep. 177; 1 Lord Raymond 317, 91 Eng. Rep. 1108;
Newington Local Board v. Cottingham (1879), L. R. 12 Ch. Div. 726.

In the latter case the court says (p. 731):

> "Although the authority is old, the doctrine cannot be better put than it is in Brewster v. Kitchell (1). 'Where the question is whether a covenant be repealed by Act of Parliament, this is the difference, viz: where H. covenants not to do an act

> or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant; so if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an Act comes in and makes it lawful to do it, such Act of Parliament does not repeal the covenant."

See, also:

Shipton Arbitration (1915), L. R. 3 K. B. 676, 683.

In *Presbyterian Church v. New York* (1826), 5 Cow. 538, the doctrine is thus expressed (p. 540):

> "If a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant."

B. The provisions of Section 499 of the Civil Code as that section existed in 1879 entered into and became a part of the complainant's franchise insuring to the complainant an exclusive franchise for all exceeding five blocks.

At the time that the complainant acquired its franchise, Section 499 of the Civil Code, which is expressly incorporated in the franchise, provided as follows:

> "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

This statute in all its terms became a part of the franchise of the complainant.*

*(In an Appendix hereto we have collected all the California statutory and constitutional provisions upon which the defendants rely to justify the construction and operation of a proposed municipal line paralleling the tracks of the complainant for twenty-one blocks.)

In *U. S. v. City of Quincy* (1867), 71 U. S. 535; 18 L. ed. 403, it is said (18 L. ed. 408):

> "It is * * * settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

To the same effect see:

Denver v. New York Trust Company (1913), 229 U. S. 123; 57 L. ed 1101, 1122;

Commissioners v. King (1869), 13 Fla. 451, 474-475;

State v. Tampa Waterworks Co. (1908), 56 Fla. 858; 47 So. 358.

The rule is thus stated by a learned writer on municipal corporations:

> "In construing a contract contained in a franchise, the provisions of a statute relating to such franchises must be considered as a part of the contract, and provisions of the constitution or statutes are as much a part of any contract between the municipality and the corporation as if they had been written into the contract."
>
> 4 *McQuillan Municipal Corporations,* Sec. 1721, p. 3678.

The rule has been frequently announced in California, and particularly in respect of the provisions of the Civil Code dealing with street railroads.

See:

Los Angeles Railway Company v. Los Angeles (1907), 152 Cal. 242; 92 Pac. 49,

holding that the provisions of Section 502 of the Civil

Code enter into and become a part of all street railway franchises.

See, also:

St. Helena v. San Francisco Ry. Co. (1914), 24 Cal. App. 71; 140 Pac. 600,

holding in like manner with respect to the provisions of Section 498 of the Civil Code.

It is hardly necessary to add that provisions of a contract which become a part of it through implication are as much protected against impairment, amendment or repeal as are provisions expressly set forth in the contract.

See:

U. S. v. City of Quincy, supra.

In *Cochise County v. Ritter* (1890), 3 Ariz. 208; 73 Pac. 448, it is said (p. 449):

> "It is to be remembered that the statute in force at the time a bond is given becomes a part of the contract as much so as if recited in the bond in precise terms. Any subsequent act of the Legislature cannot vary the contract or change the liability or increase the obligation of the sureties without their consent. To hold otherwise would be to hold that the Legislature may by act impair the obligation of a contract."

See, also:

Creighton v. Pragg (1862), 21 Cal. 115;

Blair v. Chicago (1906), 201 U. S. 400; 50 L. ed. 801;

In *Pocatello v. Murray* (1912), 21 Idaho 180; 120 Pac. 812, speaking of a water franchise granted to the defendant, it is said (120 Pac. 817):

> "The foregoing provisions of the Constitution were as much a part of Murray's contract with the City of Pocatello as if they had been written bodily into the contract. The ordinance of the city could not abrogate them and should be read in the light of and subject to the supreme law of the State."

The defendants contend that the provisions of the statute did not enter into the obligation of complainant's franchise for many reasons. All of the contentions of the defendants in this respect are dealt with fully in a later subdivision of this brief. The principal contention of the defendants is that the terms "railroad corporation" in Section 499 do not include a municipal corporation operating a street railroad. This contention is based upon the case of *Knoxville Water Co. v. Knoxville*, supra, and the other cases, state and federal, which follow the *Knoxville* case. We believe, however, for many reasons hereinafter given that the *Knoxville* case does not cover the question here involved. The question here, in so far as it involves the construction of the code section is whether a municipal corporation, exercising *proprietary* powers, is subject to the general laws of the state. The *Knoxville* case involved no such question.

V.

THE PLANS OF THE MUNICIPALITY FOR CROSSING THE TRACKS OF THE COMPLAINANT WITHOUT FIRST MAKING COMPENSATION INVOLVE AN IMPAIRMENT OF THE GRANT CONTAINED IN THE FRANCHISE AND GIVE RISE TO BOTH A "TAKING" AND A "DAMAGING" OF PROPERTY WITHOUT JUST COMPENSATION.

Heretofore we have dealt only with the feature of the plans of the municipality which involve the paralleling of our tracks. We come now to the proposed cutting and crossing thereof.

A. The crossing of the complainant's tracks by the municipal tracks without payment of compensation will deprive the complainant of property by appropriating pro tanto the easement of the complainant in the portion of the street between its tracks.

The defendants purpose to cut the rails and cross the tracks of the complainant at various street intersections without payment of compensation. If, as previously shown, the complainant has an easement and exclusive right for street railway purposes in the portion of the street occupied by its tracks, it would seem necessarily to follow that any crossing of those tracks by the city would be a *pro tanto* appropriation of the exclusive easement lawful only upon payment of compensation. Such is the law of California, and such is the holding of the cases elsewhere.

In *Georgia R. Co. v. Columbus Co.* (1892), 89 Ga. 205; 15 S. E. 305, the syllabus thus states the principle:

> "Without first making compensation for the damages which will result therefrom one railway

company cannot lay and use its track across the track of another railway company, located in a public street of a city."

In *Chicago R. R. Co. v. Chicago & St. Louis R. R. Co.* (1884), 15 Ill. App. 587, the syllabus reads as follows:

"The construction of a railroad track across a street upon which another railroad has its track, though built on the same grade, *is a taking of the latter's property for public use within the meaning of the constitution, and the latter is entitled to have the construction enjoined until compensation is made.*"

In the opinion it is said (p. 592):

"It seems clear that the construction of another railroad across that of the complainant, though built on the same grade, is a taking of the complainant's property for public use, within the meaning of the constitution. It necessitates an interference with the track and road bed of the complainant's road, which does not come within the proper and ordinary use of the street as a highway, and which will necessarily, to some extent at least, impair the beneficial enjoyment of the complainant's easement. Before this can be permitted, the damages to the complainant's property rights must be ascertained and compensation made."

In *Birmingham Traction Co. v. Birmingham Ry. Co.* (1898), 119 Ala. 129; 24 So. 368, the syllabus, fully borne out by the opinion, is as follows:

"A railroad company, in possession of and owning a right of way, has such property rights and interest that *the crossing of it by another railroad company is the taking of property* within the laws and constitutional provisions requiring just compensation to be paid to the owner before such taking."

See, also:

Memphis Co. v. Birmingham Co. (1892), 96 Ala. 571; 11 So. 642.

The principle declared in the foregoing cases is recognized and applied in the statutes of California.

Section 500 of the Civil Code of California provides as follows:

> "Any proposed railroad track may be permitted to cross any track already constructed, *the crossing being made as provided in chapter two, title three, of this part.* In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

In "chapter two, title three" referred to in Section 500 supra, appears Section 469 of the Civil Code, which reads as follows:

> "Whenever the track of one railroad intersects or crosses the track of another railroad, *whether the same be a street railroad,* wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; *and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under title seven, part three, Code of Civil Procedure, and the damages assessed and the right of way granted as in other cases.*"

"Title seven, part three" of the Code of Civil Procedure mentioned in Section 469 is the title of the Code of Civil Procedure dealing with eminent domain.

It is clear, therefore, that in California one street railroad may cross the tracks of another only upon paying for the easement thus appropriated.

B. The damage which will result from a crossing of the complainant's tracks by municipal tracks and the operation of municipal cars across the complainant's tracks constitute such "damage" as under the Constitution of California must be paid to the complainant.

In *Lake Shore Ry. Co. v. Chicago R. R. Co.* (1881), 100 Ill. 21, the court was considering the right of a railway company to damages caused by the crossing of its tracks by the tracks of another railroad. The right was predicated upon the provision of the Illinois constitution prohibiting the "damaging" of private property for public use. The Supreme Court of Illinois in holding that the railroad company whose line was crossed was entitled to damages, said (p. 32):

> "We think it was competent to show, as was attempted, and to recover for, damages to which the companies would be subjected by placing obstructions upon their right of way, whereby access to different parts of their lines would be interfered with, and their capacity for the transaction of business impaired or destroyed."

In *Chicago R. R. Co. v. Englewood Ry. Co.* (1886), 115 Ill. 375; 4 N. E. 246, the syllabi, which are a true index to the decision, read as follows:

> "In a proceeding by one railway company seeking to condemn a right of way across the tracks of another company, notwithstanding the petitioner stipulates to put down at its own expense, and keep in good repair, all necessary frogs and crossings for its main tracks across the tracks of the

other company, the defendant company, on the assessment of the damages to be paid, has the right to show to the jury that the value of its road, and its capacity to do business, will be impaired by the proposed crossing, and it is error to exclude such evidence.

"In such case the company seeking to obtain the right of way is liable for all damages directly resulting to the defendant company from the making or using of the crossing, whereby the value of its property is diminished, or its facilities are materially impaired for the transaction of its business. If the inconvenience or hindrance resulting from such crossings or other structures abridges the owner's capacity to transact an equal volume of business, it is an element of damages, even though it does not increase his expenses."

In the opinion it is said (p. 385):

"Suppose the business of a railway company requires it to use a particular part of its road all the time, so that it could not stop without greatly deranging its business and subjecting it to serious pecuniary losses. Now if, under these circumstances, a new company should be organized, and propose to run a number of tracks across that part of the old company's line in constant use, and to conduct such a business on the new road as would occupy the crossing half the time, and consequently reduce the capacity of that part of the old company's road just one-half, can it be doubted this would be an invasion of the right of property for which, under the constitution of the State, compensation would have to be made? It is manifest that the value of a railroad property, outside of advantages of location and amount of business it controls, consists in the strength, permanency and durability of its structures, and its adaptability to, and capacity for doing railroad business. The conclusion would therefore seem irresistible, that whenever the proposed condemna-

> tion and subsequent user will injuriously affect such a property in either of these respects, the injury thus occasioned will form a proper basis for the assessment of damages in a proceeding of this kind."

In *Chicago Railroad v. Chicago & St. Louis R. R. Co.* (1884), 15 Ill. App. 587, the court, speaking of the damage that would result to a railroad company whose tracks were crossed by another company, said (p. 593):

> "• • • It necessitates an interference with the track and roadbed of the complainant's road, which does not come within the proper and ordinary use of the street as a highway, and which will necessarily, to some extent at least, impair the beneficial enjoyment of the complainant's easement. Before this can be permitted, the damages to the complainant's property rights must be ascertained and compensation made."

See, also:

Georgia R. Co. v. Columbus Co. (1892), 89 Ga. 205; 15 S. E. 305;

Memphis R. Co. v. Birmingham Ry. Co. (1892), 96 Ala. 571; 11 So. 642;

Birmingham Traction Co. v. Birmingham Ry. Co. (1898), 119 Ala. 129; 24 So. 368;

Mobile R. Co. v. Louisville Co (1915), 192 Ala. 136; 68 So. 905.

And see, again:

Omaha Horse Ry. Co. v. Cable Tramway Co. (1887, C. C. Neb.), 30 Fed. 324, 332, and same case 32 Fed. 727,

holding that:

> "the inconvenience and annoyance which results from the crossing of plaintiff's tracks by the track of the defendant"

is such a damage for which compensation must be paid under a constitutional provision prohibiting the "damaging" of private property for public use without compensation.

VI.

THE MUNICIPALITY HAS NOT SOLICITED AND CONSIDERED OFFERS FOR THE SALE TO THE CITY AND COUNTY OF THE LINES OF THE COMPLAINANT AND HAS, THEREFORE, NOT COMPLIED WITH THE PROVISIONS OF SECTION 2 OF ARTICLE XII OF THE CHARTER, COMPLIANCE WITH WHICH IS A CONDITION PRECEDENT TO THE ACQUISITION OF A PUBLIC UTILITY.

Article XII of the Charter of San Francisco is entitled "Acquisition of Public Utilities." Its preamble or opening paragraph reads as follows:

> "It is hereby declared to be the purpose and intention of the People of the City and County that its public utilities shall be *gradually acquired* and *ultimately owned* by the City and County. To this end it is hereby ordained:"

Then follow sixteen sections setting forth a complete scheme for the acquisition of public utilities by purchase, condemnation, or original construction.

Section 2 of said article provides:

> "Before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities the Board of Supervisors must solicit and consider offers for the sale

> to the City and County of existing utilities in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

By the clear and explicit language of the preamble it is declared to be the purpose and intention of the people of the city and county to *gradually* acquire and *ultimately* own its public utilities. It is therefore not the purpose of the city and county to acquire *all* of its public utilities *at once*. Moreover, the city and county has never attempted to do so, and has never initiated any proceedings looking to the acquisition by purchase of *all* of the street railroads operated in the city and county.

On August 26, 1913, a special election was held to vote upon the proposition of incurring a bonded indebtedness for the construction of a street railroad "on Van Ness Avenue and from said avenue along connecting streets to Church Street and along Church Street to convenient terminals" (R. 89).

Preliminary to submitting this proposition to a vote of the people a resolution was adopted by the Board of Supervisors providing, among other things, that—

> "The Board of Supervisors of the city and county of San Francisco does hereby solicit offers for the sale to the city and county of San Francisco of *any* existing street railway or system of street railways *operated over or upon ANY street* within said city and county" (R. 173).

The resolution further called for proposals or offers in writing from the owner or owners of any

such street railway or systems of street railways, such proposal to be filed prior to the 2nd day of June, 1913.

Said resolution further provided:

> "And it is hereby announced and declared to be the purpose and intention of the Board of Supervisors to consider any and all proposals or offers that may be made for the sale of *any* street railway or system of street railways to the said city and county on said 2nd day of June, 1913, and before submitting propositions to the electors for the acquisition by original construction or condemnation of such railways or systems of street railways in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof" (R. 173).

The resolution then directs that notices soliciting offers be sent to the Presidio and Ferries Railway Company, the California Railway Company and United Rail*ways* of San Francisco.

This resolution was adopted as a preliminary to the submission to the people of the proposed bond indebtedness to provide funds for the acquisition or construction of the new railroad "on Van Ness Avenue and from such avenue along connecting streets to Church Street and along Church Street to convenient terminals" (R. 89).

This is the only resolution or ordinance adopted by the city and county soliciting offers as required by Section 2, Article XII of the Charter, quoted above.

It is the contention of complainant that this resolution does not comply either with the letter or spirit of the charter and is therefore a nullity.

As before observed, it is the purpose and intention of the people of the city and county to *gradually* acquire and *ultimately* own its public utilities. In order to accomplish this purpose, Section 2 of Article XII of the Charter requires that the Board of Supervisors must solicit and consider offers for the sale to the city and county of San Francisco of existing utilities "before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities."

The resolution above mentioned was passed in connection with and as a part of the proposed bonded indebtedness which was approved at the election of August 26, 1913.

The proposition submitted to the people did not specifically provide for any line of street railway on any part of Market Street. It provided for the construction of a street railroad "on Van Ness Avenue and from said Van Ness Avenue along *connecting streets* to Church Street and along Church Street to convenient terminals." There are other connecting streets between Van Ness Avenue and Church Street, and Market Street had not then been selected as the route for the connecting line between Church Street and Van Ness avenue.

With respect to the proposed route on Market Street between Kearney Street and Van Ness Avenue

and between Church Street and 17th Street no proposition for a bond issue was ever submitted to the people. Construction of a street railway on that part of Market Street was not contemplated or determined upon by the city until the passage of the ordinance of May 16, 1916 (R. 152).

By this ordinance the proposed new construction is characterized as "an *extension of* the Municipal Railway system along Market Street from the easterly portal of Twin Peaks Tunnel to Church Street and from Van Ness Avenue to existing municipal railway tracks in Market Street at Kearny Street" (R. 152).

The city contends that it has authority to construct "extensions" out of funds derived from the operation of other public utilities, under Section 16 of Article XII of the Charter, which reads as follows:

> Section 16. 1. "Whenever any public utility shall be operated by the city and county, the receipts from such utility shall be paid daily into the city treasury, and maintained in a special fund set aside for such utility. The Supervisors may, from time to time, make appropriations from such funds for the following purposes: * * * (d) for extensions and improvements. * * *"

The proposed construction, therefore, on Market Street between Van Ness Avenue and Church Street was authorized by the bond issue approved at the election of August 26, 1913, in connection with which the resolution soliciting offers of *all* the street railways in San Francisco was adoped. The proposed construction on Market Street between Kearny Street and Van Ness Avenue, and between Church Street and 17th

Street, on the other hand, is not supported by any bond issue but must be regarded merely as an "*extension.*" No resolution soliciting offers for the sale to the city of the existing utility on that part of Market Street was ever adopted unless the blanket resolution adopted more than three years before the ordinance of May 16, 1916, can be so regarded.

It is complainant's contention, therefore, that Section 2 of Article XII of the Charter has never been complied with by the city with respect to any part of Market Street. At the time the blanket resolution soliciting offers was adopted there was no proposition afoot for the construction of any street railway on Market Street. The proposition then submitted to the people did not mention Market Street. It was not brought home to the complainant that the city intended to "originally construct" a street railroad on Market Street, or that it desired to purchase the street railway of complainant on Market Street between Van Ness Avenue and Church Street. The omnibus resolution applying generally not only to the entire system of complainant but to the systems of other operating street railroad companies as well does not, either in letter or spirit comply with the purpose and intention of the Charter. Such purpose was to gradually acquire and ultimately own all street railways, and the spirit of the Charter provisions requires that as the city contemplated acquiring a street railway on any particular street it should solicit offers for the sale of any existing railway on that particular street before proceeding to construct its own street railway thereon.

With respect to the proposed construction on the remainder of Market Street the city and county never

solicited any offers at all. The omnibus resolution passed more than three years before such construction was decided upon cannot be considered as a bona fide request for an offer to sell complainant's lines on Market Street to the city. The Board of Supervisors proceeded ruthlessly and without regard for the provisions of the Charter, to *originally construct* a new street railroad on that part of Market Street, and the city and county is now persisting in such construction in violation of the provisions of the Charter and without regard to the consequences of such a proceeding upon the property rights of complainant.

As declared by Section 2 of Article XII the purpose of soliciting offers for existing utilities is that "the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

The charter makers had some thought for the rights of street railway owners already operating on the streets of the city and county. An opportunity was intended to be given them to sell their street railways to the city for a fair price. The city and county was required to negotiate with them before proceeding to original construction. This procedure was deemed equitable because it would enable the company already operating to sell its street railway at a fair price and it might enable the city and county to acquire an existing public utility at a cost lower than original construction.

These provisions of the Charter have been ignored by the city and county, and it is now proposed, without soliciting offers for the purchase of the Market Street system and without giving the complainant an opportunity to sell at a fair price, and without giving the

city and county an opportunity to acquire the existing railways "at the lowest possible cost thereof" to construct an entirely new street railway system outside of the present existing tracks, a proceeding which will render valueless complainant's franchise rights on Market Street, and irreparably injure and damage the valuable business it has built up and now possesses thereon.

It is most respectfully submitted, therefore, that the proposed construction is in violation of the letter and spirit of the Charter.

VII.

THE CLAIM OF THE DEFENDANTS THAT THE COMPLAINANT'S FRANCHISE FROM ITS INCEPTION WAS SUBJECT TO IMPAIRMENT AND DAMAGE BY THE OPERATION OF A SECOND RAILROAD WHICH WOULD PREVENT ACCESS TO THE COMPLAINANT'S CARS IS UNTENABLE.

The defendants argue that the loss of patronage suffered by the complainant because access to its cars is made impossible or dangerous by the operation of the municipal cars is *damnum absque injuria.*

This argument of the defendants rests upon three grounds: first—that the right of the city to operate in such manner as to inflict damage against the complainant was reserved by the city at the time the complainant acquired its franchise; second—that the use of a street by a street railway is a proper and legitimate use of the street and one included within the original dedication thereof and involves the imposition of no *new servitude* in the street, and third—that

the damage caused by the municipal line is referable to the police power, and is remediless.

These three propositions may be briefly discussed.

A. The city has no reserved right to operate its cars in such manner as to cut off or impair access to the complainant's cars.

The defendants in the trial court argued and the court held that the complainant was not entitled to damages caused by the cutting off or impairment of access to its cars (239 Fed. 997, R. 192). This argument and holding is based upon the claim that if the franchise of the complainant is not exclusive, the city has the right to operate its line and any damage that results from the operation thereof is *damnum absque injuria*. In this connection the defendants also argued that the provision in Section 499 of the Civil Code limiting to five blocks the use and occupation of the same street by two street railroads necessarily implied a right in the second railroad to inflict upon the first whatever damage would result from the *fact* or *manner* of operating *for five blocks*. Enlarging upon this premise the defendants argued that any injury to complainant's franchise that would result from the manner of operation along twenty-one blocks on Market Street would be the same in kind as that which would result from a like manner of operation for five blocks, and differ therefrom only in *degree*. From this argument the defendants deduced the conclusion that unless the complainant's franchise is exclusive the complainant is without remedy for any damage suffered by it

through the *manner* in which the municipal cars are operated. This argument, however, is fallacious to the last degree. It is true, of course, that the complainant took its franchise subject to whatever rights and privileges were reserved to the city, either expressly or by implication. If the complainant did not acquire a *pro tanto* exclusive franchise, the city may now have the right to operate cars on the same street as the complainant, but, if it has that right, it does not follow that it may operate its cars *in any manner that it chooses.* There is a great distinction between a *legitimate* manner of operation which lessens the emoluments of a pre-existing franchise and *illegitimate* manner of operation which directly and physically *interferes* with the exercise and enjoyment of such franchise. It may be conceded that certain people will ride on the municipal cars from choice. If the city has the right to operate its cars the loss by the complainant of the patronage of persons who choose municipal cars will be due to competition and the complainant will be without remedy for such loss. But if other persons desire to board the complainant's cars and because of physical conditions created by the city are *unable* to do so, or because of the danger are *deterred* from doing so, the loss of the patronage of such persons will not be due to *competition* but to an unlawful physical interference with the exercise of the complainant's franchise. Such loss is a damage for which compensation must be paid to the complainant under the provisions of the Constitution of California.

The five block provision in Section 499 of the Civil Code merely reserved the right to allow two railroads

to operate upon the same street *for five blocks*. It did not reserve the right to allow a second railroad to operate *in such manner* as would physically interfere with the exercise and enjoyment of the first franchise. It did not reserve the right to permit a second railroad to operate in such manner as to prevent ingress and egress to and from the cars of the first railroad. Such a reservation would have been repugnant to the franchise granted to the *first* railroad. The whole argument of the defendants rests upon the false premise that given the right to *operate* there necessarily follows the right to operate in such manner as will physically interfere with the enjoyment of the complainant's franchise. The defendants and the trial judge overlooked entirely the distinction between *a right to operate* and *such manner of operation* as interferes with the exercise and enjoyment of another's franchise rights. This distinction, as we have already shown, was clearly pointed out in the opinion of Judge Brewer in *Omaha Horse Ry. Co. v. Cable Tramway Co.*, supra.

Again, even were we to assume that the complainant's franchise *when granted* was subject to a reserved right of the city to operate its own cars in such manner as to damage complainant's franchise by preventing or impairing the free exercise and enjoyment of it, it by no means follows that such reserved right still exists. After the complainant acquired its franchise, the Constitution of California was amended so as to prohibit the "damaging" of private property for public use *without compensation*. As previously pointed out, this provision of the constitution annexed a new attribute to private

property and conferred a new right upon the owner of property. After January 1, 1880, the city could no longer operate street cars *in such manner* as to interfere with the free exercise of the complainant's franchise without *paying in advance* for the damage so caused. It is immaterial in this connection that the franchise of the complainant was acquired prior to the enactment of the constitutional provision.

See

Swift v. Newport News (1906), 105 Va. 108; 52 S. E. 821, and cases cited.

It should also be kept in mind that the Market Street franchise of the complainant was regranted and confirmed on May 29, 1882, when the constitutional prohibition against "damaging" private property without compensation was in force (R. 25).

B. If right of access to property is cut off or materially impaired, it is immaterial that the public work which causes it is such as does not involve the imposition of a new servitude upon the street.

In numerous cases, owners of property abutting upon a public street have sought compensation on account of the *mere construction* of a street railway upon the street. In a few jurisdictions compensation has been awarded in such cases *if the abutting owner owned the fee* in the street. In such jurisdictions the construction of a street railway on a street is regarded as the imposition of a new servitude upon the street. In most jurisdictions compensation has been denied to an abutting owner for the *mere construction* of a street railway

upon the street without regard to whether the abutting owner owned the fee or not. In the latter jurisdictions relief is denied upon the ground that the use of a street for a street railway is one authorized by the original dedication of the street and does not involve the imposition of a new servitude upon the street. In the cases so holding, however, it was not claimed that the construction of the street railway deprived the owner of property or access to his property or materially interfered therewith. Whenever access to property abutting on a street has been cut off or materially impaired by the construction of a street railway damages have been allowed to the owner. For such annoyances and inconveniences as the abutting owner *suffers in common with the general public*, he may not recover compensation *unless the improvement upon the street is a new burden.* But even though the public improvement is not a new burden upon the street, if its construction inflicts upon an abutting owner a *damage in excess of that suffered in common with the general public*, a right of damage accrues to such owner.

See:

Mason City R. Co. v. Wolf (1906, C. C. A. 8th), 148 Fed. 961.

This case holds that the damages payable to the owner of property "damaged" for public use is measured by the injury to the property *in excess of that suffered in common with the general public.*

This is also the test recognized and applied in California.

See:

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750;

Smith v. Southern Pacific Co. (1905), 146 Cal. 164; 79 Pac. 868;

Williams v. Los Angeles Ry. Co. (1907), 150 Cal. 592; 89 Pac. 330;

Fairchild v. Oakland Ry. (1917, Cal. Sup. Ct.), 169 Pac. 388.

In the case last cited the appellant sought to reverse a judgment for damages for obstructing access to property abutting upon a street through the construction of a street railway upon the ground that no new servitude had been imposed upon the street. The Supreme Court of California held this fact to be immaterial, *if the plaintiff had suffered damage in excess of that suffered in common with the public.*

Invariably, therefore, damages have been awarded where access to property has been cut off or materially impaired. In all of the cases cited supra in which damages were awarded to abutting owners for a destruction or impairment of a right of access to his property, the rule was recognized that the construction of a street railway upon a street was not the imposition of a new servitude.

See particularly:

Slaughter v. Meridian Light Co. (1909), 95 Miss. 251; 48 So. 1040;

Williams v. Meridian Light Co. (1915), 110 Miss. 174; 69 So. 596;

Jaynes v. Omaha Ry. Co. (1898), 53 Neb. 631; 74 N. W. 67;

Stehr v. Mason City Ry. Co. (1906), 77 Neb. 641; 110 N. W. 701;

Foster Lumber Co. v. Arkansas Ry. Co. (1908), 20 Okla. 583; 95 Pac. 224.

See also:

2 Elliott Roads and Streets (3rd Ed.), Sec. 928, p. 381;

Nellis on Street Railways, Sec. 80, p. 180;

Booth on Street Railways (2nd. Ed.), Sec. 77, p. 141.

The latter author, after stating that the owner of property abutting on a street owns in the street an easement for access to his property, says that in this relation the owner "may prevent any act which would destroy or materially impair his right of access, but he is not entitled to protection against mere consequential damages which he suffers in common with others."

See also:

Booth on Street Railways (2nd Ed.), Sec. 80, p. 146;

12 Am. & Eng. Ency. of Law (2nd Ed.), 1174.

C. The city cannot, under the police power, justify its manner of competition so as to destroy the complainant's right to compensation for the damage so inflicted upon its franchise.

The defendants in the trial court argued and the trial judge held that the complainant's franchise was subject at all times to the exercise of the police power,* and that,

* 239 Fed. 996; R. 191.

whenever in the interest of public convenience it became necessary or desirable to construct additional street railways the owner of an existing railway had no recourse for the injury to its franchise. We have already considered, somewhat at length, the argument based upon police power. It has never been held that private property may be taken or damaged, without compensation, under the police power if the property so taken or damaged is "innocuous in itself".

In *Freund on Police Power,* Sec. 512, p. 547, the author says:

> "The exercise of the police power can hardly result in appropriation of property by the public, unless it be by way of confiscation as a penalty or for the purpose of destruction; for if the property is dangerous, it is dangerous in the hands of the public as well as of the private owner."

The distinction between the police power and eminent domain is thus stated by the same author (p. 546):

> "Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.'" (quoting from Davidson v. New Orleans, 96 U. S. 97.)

In *Pacific Telephone Co. v. Eshleman* (1913), 166 Cal. 640; 137 Pac. 1119, the court speaking of "certain fun-

damental principles" which distinguish the exercise of a police power from that of eminent domain, says:

> "The first of these is that this power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation, it amounts to a taking of the property, and the order is then referable, not to the police power, but to the power of eminent domain. The second of these is that this regulatory power falls into three natural subdivisions: 1. The right to regulate tolls and charges, to the end that fair compensation may be returned and excessive charges be forbidden; 2. The right to prevent discrimination upon the part of the public utility directed against those who employ it, or make use of its agencies, or the commodity which it furnishes; 3. The right to make orders and to formulate rules governing the conduct of the public utility, to the end that its efficiency may be built up and maintained and the public and its employees be accorded desirable safeguards and conveniences. Beyond these matters regulation, as regulation, does not and from the very meaning of the word cannot go." (166 Cal. 663.)

See also:

Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049.

The turnpike company was the owner of a franchise to maintain a turnpike and exact tolls. The franchise was for twenty-five years with the provision that it should extend until such time, within that period or beyond it, as the city should pay to the company the original cost of construction of the turnpike. Some years after the franchise was granted a statute of Illinois was enacted providing that:

> "No toll gate shall be erected or kept, or toll demanded, within the corporate limits of any incorporated city or within 160 rods of such limits."

The locus of the turnpike at the time it was constructed was outside of the corporate limits of Belleville. Subsequently, however, the city annexed sufficient territory to bring the turnpike within the corporate limits, whereupon the city assumed and exercised control of the turnpike and commenced the present action to restrain the turnpike company from charging any tolls or exercising its rights and privileges under its franchise. From a judgment in favor of the city the turnpike company appealed. The Supreme Court of Illinois, in reversing the judgment of the Circuit Court, held that the city was "taking" the property of the company by interfering with the exercise of its franchise and that this could not be justified under the Illinois statute above quoted except upon payment of compensation. The court also held that the destruction of the franchise could not be justified under the police power. The portion of the opinion dealing with this matter is too lengthy for quotation. The substance of the holding is that the power exercised was not the police power, at all, since there was no *regulation* of the turnpike but an actual *taking* thereof.

The court held that while, without compensation to the owner, property may be injured through the enforcement of a reasonable *regulation*, it cannot be taken or its use impaired by any law extending beyond mere *regulation* unless compensation is paid.

Any injury to the property of a public utility corporation consequent upon a police *regulation* is a loss which it must suffer for the common good. The injury which the defendants seek to impose

upon the property of the complainant is not due to any *regulation* of the complainant's property. It is an injury and damage inflicted by the city in the interest of its own utility.

See,

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.), 241 Fed. 912.

The complainant in the case cited was a gas and electric company furnishing light and power in the City of Los Angeles. It was operating under the self-executing provisions of the Constitution of California, discussed by this court in *Russell v. Sebastian* (1914), 233 U. S. 195; 58 L. ed. 912. The City of Los Angeles was also engaged in operating a public utility for the distribution and sale of electric energy in the City of Los Angeles. The city, in the interest of its own utility, passed an ordinance requiring the plaintiff to remove its poles, crossbars, wires and other appliances upon notice whenever it was desirable that the municipal utility should occupy with its poles, wires and appliances the places in the city's streets already occupied by the appliances of the plaintiff. After the enactment of the ordinance the plaintiff was notified by the city to remove certain of its wires to new locations and to entirely remove certain other fixtures. Thereupon the plaintiff sued to enjoin the city officials from enforcing the order and to have the ordinance declared void. The point involved in the case is thus stated in the opinion of Judge Bledsoe (p. 915):

> "• • • the city of Los Angeles having decided, because of reasons which were, no doubt, suffi-

ciently cogent and persuasive, that it would engage in the business of furnishing electrical energy to itself and to its inhabitants, in order that it may proceed in accordance with its own determined plans in the premises, has decreed by ordinance that privately owned companies engaged in the same business, and now and for some time lawfully occupying the public streets, may be required to remove or relocate, at their own expense, and subject to a penalty of fine and imprisonment for refusal, such instrumentalities situate upon the public ways of the city as seem to interfere with the proposed installation of its system. Or, to phrase it still differently, in order that its own municipal lighting system heretofore determined upon may be installed, the city has enacted that, in so far as the same may be necessary, other systems, already installed and belonging to private corporations, must be removed or relocated at the expense of the owners thereof."

The right of the city to enact and enforce the ordinance was, as in the present case, predicated upon "public necessity" and the "police power". The court, after holding that the police power was an attribute of sovereignty and its exercise governmental in character, says (p. 918):

> "While operating in its private capacity, and considerations of necessity giving rise to an exertion of the police power being nonexistent, as adverted to hereinabove, the power of police is wanting, and may not be asserted in furtherance of that which is merely expedient. In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions."

The court in support of its conclusion quotes from *South Carolina v. U. S.* (1905), 199 U. S. 437; 50 L. ed. 261.

Further in the opinion, the court while holding that the plaintiff had no vested right in a particular place in the street which was not subject to *regulation* under the police power says (p. 919):

> "* * * however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets. It may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right" (citing many cases).

In concluding the court said (p. 921):

> "As indicated hereinabove, assuming the necessity, propriety, and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

A decree was accordingly entered declaring the ordinance void and enjoining its enforcement.

See, also:

Owensboro v. Telephone Co. (1913), 230 U. S. 58; 57 L. ed. 1389.

If private property is damaged by a public improvement, the damage must be paid. No public convenience or necessity, however urgent, will justify the damaging of private property without compensation.

"If the public desire to erect works for public use, then the public, the party benefited, must bear the burden" and not impose it upon the property owner.

Gillespie v. South Omaha (1907), 79 Neb. 441; 112 N. W. 582.

> "The police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc. And upon like principle, a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain."

Chicago v. O'Brien (1884), 111 Ill. 532, 536, cited and approved in *Sanitary District v. Chicago R. Co.* (1915), 267 Ill. 252; 108 N. E. 312.

In the case last cited there is an interesting discussion of the difference between police power and eminent domain and the rights of the owner of private property consequent upon an exercise of either power.

See, also:

Illinois Co. v. Moriarity (1916), 135 Tenn. 446; 186 S. W. 1053.

And see

Hollingsworth v. Tensas (1883, C. C. W. D. La), 17 Fed. 109,

distinguishing between eminent domain and police power and holding that under the police power private property cannot be "taken" or "damaged" without compensation.

VIII.

THE ARGUMENTS OF THE DEFENDANTS IN SUPPORT OF THEIR CONTENTION THAT THE COMPLAINANT'S FRANCHISE IS NOT EXCLUSIVE FOR ALL IN EXCESS OF FIVE BLOCKS ARE UNTENABLE AND FIND NO SUPPORT IN THE AUTHORITIES UPON WHICH THE DEFENDANTS RELY.

The defendants contend that the complainant's franchise is not exclusive for all over five blocks covered by it and therefore that the operation of the municipal railroad will not violate any right of the complainant in so far as such right is predicated upon an exclusive franchise.

In the trial court the defendants argued that:

(1) The prohibition in Section 499 of the Civil Code against the "occupation and use" of the same street by "two railroad corporations" was a mere limitation upon the granting power of the Board of Supervisors, and, as such, was

capable of being removed at any time and, in fact, was removed by amendment of the section prior to the commencement of the municipal construction;

(2) The prohibitory provisions of Section 499 of the Civil Code were of a *police* character, in the interest of the public and not of a franchise-holder, and therefore did not enter into the obligation of complainant's franchise so as to be incapable of amendment or repeal;

(3) If the prohibitory provisions of Section 499 of the Civil Code did enter into the obligation of the complainant's franchise so as to confer upon the complainant a substantive right, that right was capable of amendment or repeal under the reserved power "to alter, amend or repeal" the complainant's charter; and

(4) The term "railroad corporations" in Section 499 of the Civil Code did not include a *municipal* corporation owning and operating a street railroad. We will now briefly deal with each of these four propositions.

A. Section 499 of the Civil Code was not a mere limitation upon the powers of the Supervisors in respect of granting street railway franchises. It was intended to secure to a franchise holder an exclusive right for all exceeding five blocks upon any street covered by the franchise.

The defendants contended in the lower court that Section 499 of the Civil Code was intended as a mere limitation or restriction upon the authority of the Board of Supervisors to grant street railway fran-

chises, which authority was conferred in Section 497 of the Civil Code. They further argued that Section 499 conferred no *right* upon a franchise holder. As a mere limitation upon the granting power, the defendants argued that the prohibition of the section might be removed at any time and was, in fact, removed by the amendment to Section 499 in 1911.*

This contention of the defendants was sustained by the trial court (239 Fed. 995, R. 190). It will be recalled that Section 497 of the Civil Code granted to the Board of Supervisors of an incorporated town power to authorize the construction of railroad tracks through the streets and public highways of the city. Section 498 of the Civil Code provided that every franchise granted by the Board of Supervisors, "in addition to the restrictions which they are authorized to impose", must contain certain other provisions specifically enumerated in the section. Section 499 then provided that:

> "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

The meaning of the section and the intention of the Legislature will be better understood when we consider the state of the law at the time the section was adopted, as well as the history of preceding legislation. The earlier statutes upon the subject, as previously noted, will be found in an appendix hereto.

* See amendment of 1911 to Sec. 499 in appendix hereto.

It will be seen that the first statute in California dealing with street railroads was approved on March 28, 1870. The second portion of the first section of that act was the prototype of Section 499 of the Civil Code and reads as follows:

> "Whenever any other railroad or company shall be granted the use of the same street or any part thereof they shall pay for the use of the rails already laid an equal share of the cost of constructing and maintaining the railroad on the street or part of the street thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such grant shall be made* for more than five blocks in all."

This statute was amended on April 4, 1870.

The only change effected by this amendment was to limit the joint *track* grant to *two* blocks instead of *five* blocks. The last clause of the statute after the amendment of 1870 read as follows:

> "But no such joint grant shall be made for more than *two* blocks in all."

On March 23, 1872, Section 1 of the foregoing act was again amended. After the second amendment the latter portion of the act read as follows:

> "*But no such joint grant* shall be made in the City and County of San Francisco for more than *two* blocks in all."

It will be noted that the last amendment confined the operation of the prohibition to the City and County of San Francisco, but otherwise made no change in the law.

It will thus be seen that all of the statutes antedating Section 499 of the Civil Code dealt with the

right of one street railroad company to use the *tracks* of another street railroad company. All of the amendments to the original statute had to do with limitations upon the *joint use* of the "*track*". While the Legislature that enacted Section 499 of the Civil Code was in session there was pending in the Supreme Court of California the case of *Oakland Railroad Co. v. Oakland-Brooklyn Railroad Co.* (45 Cal. 365). This case had been pending since September, 1871, and in it the defendant made the contention, subsequently upheld by the Supreme Court, that the statute of 1870, while limiting the right to use the *track* of the first franchise holder "was not intended to be a limitation upon the power • • • to grant an *independent* right" (45 Cal. 378). It was thereby established that there was nothing in the existing laws to prevent two street railroads from occupying the same *street* for an indefinite length provided the second did not use the tracks of the first. It was with this in mind that the Legislature, in enacting Section 499 of the Civil Code, prohibited the use of the same "street" by two railroad companies "for more than five blocks". Section 499 of the Civil Code, therefore, was intended to prevent not only the use by a second railroad of the *track* of another railroad for more than five blocks; it was intended to prevent the existence of a second railroad upon the same *street* for more than five blocks.

People v. Rich (1879), 54 Cal. 74.

The Legislature, in enacting Section 499, made two changes in the existing law, viz: (a) it prohibited the existence of two street railroads upon the same "street"

for more than five blocks without regard to whether the second occupied the tracks of the first or not; and (b) it changed the prohibition of the existing law from "two blocks" to "five blocks". These two changes effected by the statute are closely related. The Legislature, intending to prohibit the use of the same "street" by more than two railroads, evidently believed that a limitation upon the *joint* use of a street to *two* blocks would be too narrow and therefore extended the right to *five* blocks.

Having thus considered the history of the statute and the changes effected in the law by the enactment of Section 499, it remains to be considered what rights were guaranteed to a grantee of a street railroad franchise by the provisions of the section. The section, it will be noted, makes provision for the use of the same street by two railroads in two different ways: (a) on the same track, and (b) on independent tracks. It also provides that the joint use of the street, howsoever exercised shall not exceed five blocks. It is evident, therefore, that the section contained both a reservation of power and a grant of immunity—a reservation in the state, the grantor of the franchise, to permit the street to be used by a second railroad for five blocks,—an immunity in the first franchise holder against the existence of a second railroad on the same street for more than five blocks. The section reserved the power to permit a second railroad to occupy and use the tracks of another railroad. Coupled with the reservation of power to so burden the franchise of the first railroad was a corresponding immunity in the

first railroad to be free from the burden of a second on the same track for all exceeding five blocks. The section also reserved the power to permit a second railroad, on the same street on *independent* tracks. This reservation also was coupled with a corresponding immunity in the first railroad for all exceeding five blocks. The two clauses of Section 499 are correlative. The first *reserved a power* in the state (the grantor of the franchise), and the second *conferred a right* upon the grantee of the franchise. The section means precisely what it would mean if it had provided:

> "It shall not be lawful for two railroad corporations to occupy and use the same street or track for a distance of more than five blocks."

The meaning of the section necessarily was that the *occupation* and *use* of the same street by two railroad corporations for more than five blocks should not be made lawful.

In *Chenango Bridge Co. v. Binghamton Bridge Co.* (1866), 3 Wall. 51; 18 L. ed. 137, the charter of a bridge company contained a provision

> "that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of the Delaware River, within two miles, either above or below the bridges, to be erected and maintained in pursuance of this Act" (18 L. ed. 144).

Subsequently an act of the legislature chartered a bridge company to erect a bridge within the prohibited distance. The second act was held to be unconstitutional as impairing the obligation of the first franchise.

The court, speaking of the provision of the first charter that "it shall not be lawful for any person or persons to erect a bridge within the distance of two miles", said (18 L. ed. 145):

> "As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the Legislature. The restraint was on the Legislature itself. The plain reading of the provision, that 'It shall not be lawful for any person or persons to erect a bridge within a distance of two miles', is, that the Legislature will not make it lawful by licensing any person, or association of persons, to do it."

To the same effect see:

Farrington v. Tennessee (1897), 95 U. S. 679; 24 L. ed. 558.

We submit that the provisions of Section 499 of the Civil Code were not a mere limitation upon the power of the supervisors to grant franchises. We submit that the section conferred a *right* upon the franchise holder, the exclusiveness of which was limited only by the five block provision of the section. As previously noted, the section reserved to the grantor the power not only to permit two railroads to use the same *street* for five blocks, but also to permit a second railroad *to use the tracks* of the first *for five blocks*. Surely it would not be claimed that the section could be so amended as to permit a second railroad to occupy the *tracks* of a first railroad for an indefinite length. How then can it be claimed that the provision against the joint use of the *street* for five blocks can be amended so as to permit the joint use of the *street* for an indefinite length?

B. The provision of Section 499 of the Civil Code prohibiting the occupation and use of the same street by two railroad corporations for more than five blocks was not a mere police regulation enacted solely in the interest of the public and incapable of entering into the obligation of the complainant's franchise.

The defendants argued in the lower court that the prohibition against the occupation and use of the same street or track by two railroad corporations contained in Section 499 of the Civil Code was of a *police* character, capable of being repealed or amended at any time when public convenience required it or made it desirable, and, therefore, that it did not become part of the obligation of the complainant's franchise. This argument, however, proves too much. If tenable at all, it means that no *exclusive* franchise on city streets can ever be granted to a street railroad corporation. The argument means, if it means anything, that the rights of a street railway company in the city streets are mere *licenses* capable of being revoked at the city's pleasure, and not *contracts* vesting property rights incapable of amendment or repeal. The argument of the defendants in the lower court was that a prohibition against the use of the same street by a second corporation might be repealed at any time, under the police power, if public convenience in the matter of increased transportation facilities so required. This argument, as already stated, if it means anything, means that no *exclusive* franchise for street railways can ever be granted.

With the objects, purposes and limitations of the police power we shall hereafter deal. At the moment we confine ourselves to the discussion of the proposition

advanced by the defendants, that a provision of a street railway franchise vesting a *pro tanto* exclusive interest in the city's streets for street railway purposes may be altered, amended or repealed at any time under the police power of the State. In many cases similar arguments have been advanced and invariably they have been repudiated. The cases already cited to the effect that a street railway franchise is an irrevocable contract are here in point. In most of them, it may be observed, it was argued that the property of the franchise-holder could be curtailed or entirely destroyed in the exercise of the police power. In addition to the cases already cited, see:

City Railway Co. v. Citizens' Street R. Co. (1897), 166 U. S. 557; 41 L. ed. 1114,

upholding an exclusive street railway franchise.

See, again:

Grand Trunk Western Ry. Co. v. City of South Bend (1913), 227 U. S. 544; 57 L. ed. 633.

In the case just cited the Supreme Court of Indiana held that an ordinance granting a franchise to lay a double track on Division Street in the City of South Bend might be repealed at any time under the exercise of the police power of the city. The argument made and justified by the Supreme Court of Indiana was similar to the one advanced by the defendants here, namely, that a franchise of a street railway company to use the city's streets is not a contract incapable of amendment or repeal, but is more in the nature of a revocable license subject at all times not merely to regulation, but to abrogation under

the police power. Upon writ of error to the Supreme Court of Indiana this court held that a franchise of a street railway company was an irrevocable *contract* and not a mere *license*. It further held that while the city, in the exercise of its police power, might lawfully *regulate*, within reasonable limits the exercise of the franchise, *it could not abrogate the franchise*. After citing various examples of exercise of police power strictly so-called, this court said (p. 639):

> "*These, however, are examples of the persistence of the power to regulate, and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use, but destructive of the franchise.*"

Further in the opinion it is said (p. 639):

> "The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650; 29 L. ed. 516; 6 Supt. Ct. Rep. 252.
>
> "The state, with its plenary control over the streets, had this governmental power to make the grant. *There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power* could not be invoked to abrogate it as a whole or to impair it in part."

Again (p. 640):

> "The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted

by the state. *If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.*

"The power to regulate implies the existence, and not the destruction, of the thing, to be controlled."

As we have already shown, in many cases it has been argued that a franchise purporting to grant an exclusive right was, nevertheless, subject to the police power so as to permit of a second grant of the same nature. Such arguments have been universally repudiated by this court.

In *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing & Mfg. Co.* (1885), 115 U. S. 650; 29 L. ed. 516, the court was considering an *exclusive* franchise granted to the appellant for supplying the city of New Orleans with gas by means of pipes, mains and conduits laid in the streets of the city. After the *exclusive* franchise had been granted the Constitution of Louisiana forbade such exclusive franchises, and thereupon another franchise was granted to the appellee. The second franchise, however, was held to impair the obligation of the first and to be, for that reason, invalid.

See, also:

New Orleans Water-Works Co. v. St. Tammany Water-Works Co. (1882 C. C. E. D. La.), 14 Fed. 194.

In this case the complainant had a water-works franchise which purported to be exclusive. Later a second franchise was granted to the defendant. The

argument was made that the second franchise was lawfully granted under the police power, and that the first franchise, although professing to be exclusive was in reality not exclusive but subject at all times to the exercise of the police power, and, therefore, to the granting of a second franchise.

Here, again, we have the contention that a contract incapable of impairment may not be made with respect to the water supply of a city. Replying to this argument Judge Pardee said (p. 199):

> "I desire to remark that there seems to me to be a great misapprehension as to the force and effect and proper exercise of the police power of a state. Its power and far-reaching effect may perhaps not be measured by general rules and definitions, and each case as it arises may have to be determined on its own particular facts and circumstances.
>
> "It seems, however, to be clear to me that regulations pertaining to the public health, manners, and morals come within its jurisdiction, and that, therefore, whenever any business, occupation, rights, franchises, or privileges become obnoxious to the public health, manners, or morals, they may be regulated even to suppression, individual rights being compelled to give way for the benefit of the whole body politic.
>
> "It seems equally clear to me that when, in the exercise of the police power, private property, or private or vested rights, must be taken for public use in order to carry out, or allowed to be carried out, improvements and regulations, or to carry on business or occupations, or schemes of public works, looking to the amelioration and benefit of the public health, manners, or morals, such private property or private rights of property must be entitled to the protection given by the constitution of the United States declaring, 'nor shall private property be taken for public use without just compensa-

tion' (see U. S. Const. Fifth Amend.), and by articles 155 and 156 of the constitution of Louisiana, declaring:

"Art. 155. 'No ex post facto law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made.'

"Art. 156. 'Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid.'

"All property of corporations or individuals is owned subject to the proper exercise of the police power. If my lot of ground is needed for a public hospital or jail, no doubt I am entitled to compensation before it can be taken from me. If my vested rights are needed to supply the city of New Orleans with pure water, must I not likewise be compensated?"

This case was affirmed in *St. Tammany Water Works Company v. New Orleans Water Works Company* (1887), 120 U. S. 64; 30 L. ed. 563.

In *New Orleans Water Works Co. v. Rivers* (1885), 115 U. S. 674; 29 L. ed. 525, an exclusive water-works franchise was upheld against a contention that a subsequent franchise was a mere exercise of the police power, the court saying (p. 528):

"It is idle to insist that this contract was prejudicial either to the public health or to the public safety."

In *City of Walla Walla v. Walla Walla Water Co.* (1898), 172 U. S. 1; 43 L. ed. 341 (affirming 60 Fed. 957), the same principle was applied. In the opinion it is said (43 L. ed. 347):

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

"If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. * * *

"*But where a contract for a supply of water is innocuous in itself,* and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

See also:

Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049.

The latest case upon the subject is

Interurban Ry. & Terminal Co. v. Public Utilities Commission (1918 Ohio), 120 N. E. 831.

In this case a suburban railway company sought an increase in rates at the hands of the Public Utilities Commission of Ohio. The City of Cincinnati, one of the

parties mentioned in the complaint, demurred to the complaint, claiming that the rate of fare to be charged by the complainant was fixed in its franchise. It contended that this franchise was a contract immune from impairment. On the other hand, the railway company contended that the Public Utilities Commission had power to fix its rates "notwithstanding, and in disregard, of the contract", and, further, "that this may be done in the exercise of the police power of the state". These contentions were repudiated by the Supreme Court of Ohio, whose holding is correctly summarized in the syllabus as follows:

> "*A contract concerning proprietary rights, and harmless in itself,* made by a municipality in the exercise of power clearly conferred, is protected by the Constitution, and the police power cannot be invoked to abrogate or impair it."

As indicated in the syllabus, the holding of the court was predicated upon the ground that a street railway franchise was "innocuous in itself" and therefore entitled to be protected against impairment through an alleged exercise of police power.

The foregoing cases clearly show that if the subject-matter of a franchise is "innocuous in itself" the police power cannot be invoked to abrogate or impair it. The construction and operation of gas works, power plants, lighting plants, water works and street railways are within the class of public works "innocuous *in se*". They are not like matters affecting public health or morals, such as fertilizing plants, garbage incinerators, breweries or distilleries, and may, therefore, unlike the class just mentioned, be made the subject-matter of

contract as distinct from *license*. Being the proper subject-matter of contract, whatever rights are vested by the contract are necessarily protected by the constitutional guaranty of immunity from impairment.

It was proper for the Legislature of California to grant (through the instrumentality of the Board of Supervisors of San Francisco) to the complainant an exclusive or *pro tanto* exclusive franchise covering the streets of San Francisco. That contract, when granted, vested in the complainant *contract rights* to abrogate or impair which the aid of the police power cannot be invoked.

C. The right of the complainant to exclude a second street railroad from the streets occupied by it under its franchise, was a right of which the complainant could not be deprived under the reserved power of the State to alter, repeal, or amend corporate charters.

The third ground upon which the defendants in the trial court argued that the provision of Section 499 of the Civil Code did not enter into the obligation of the complainant's franchise was that the power to alter, amend or repeal corporate charters reserved in the California Constitution of 1849, permitted the amendment or repeal of all laws in respect of street railroads. The California Constitution of 1849 in Section 31 of Article IV provided as follows:

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

A casual reading of this section would seem to make it clear that the only laws over which a power of amendment or repeal was thus reserved, were laws having to do with the *formation* of corporations; in other words, laws conferring the *right to be a corporation.* There is nothing in the section which includes the right to amend or repeal *contracts* of corporations or deprive corporations of *contract* or *property* rights, and such has been the holding of the authorities.

See:

Railroad Tax Cases (1882 C. C. Cal., per Field J.), 13 Fed. 722, 754-757;

County of Santa Clara v. Southern Pacific Co. (1883 C. C. Cal., per Field J.), 18 Fed. 385;

Southern Pacific v. Ortin (1879 C. C. Cal.), 32 Fed. 457, 474;

Market Street Ry. Co. v. Hellman (1895), 109 Cal. 571, 580-581; 42 Pac. 225;

Detroit v. Detroit Road Co. (1880), 43 Mich. 140, 147; 5 N. W. 275.

The foregoing cases hold that the reservation of power to alte. or amend the laws under which corporations are *formed* does not include power to amend or repeal laws which grant *contract rights* to such corporations. Contract rights acquired by a corporation are as sacred as any other kind of property, and as much within the protection of the Federal Constitution.

In *St. Louis Iron Mountain Co. v. Paul* (1899), 173 U. S. 404; 43 L. ed. 746, the court, speaking through Chief Justice Fuller, said:

"The power to amend 'cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made'." (quoting from the opinion of Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700; 25 L. ed. 496; 43 L. ed. 748).

In *Owensboro v. Cumberland Tel. Co.* (1913), 230 U. S. 58; 57 L. ed. 1389, the appellee was the possessor of a franchise authorizing it to maintain its poles and wires upon the streets of the appellant. After the appellee had been enjoying the franchise for almost twenty years, the city council passed an ordinance requiring it to remove its poles and wires "within a reasonable time after the passage of the ordinance", in default of which the mayor was directed to have them removed. Thereupon the appellee filed a bill to enjoin the threatened enforcement of the ordinance. Replying to the contention that the attempted repeal of the franchise (which was perpetual in duration) was justified under the reserved power to alter, amend, or repeal, the Supreme Court, speaking through Mr. Justice Lurton, said:

"This general power to repeal ordinances obviously refers to ordinances which are legislative in character and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. • • •

"To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils • • • • • •

> "This clause of the charter in the instant case reserves no more than the power to repeal, as well as to make and amend, ordinances, but by no means operates to convey the power to 'repeal' a grant of street rights which had been accepted, and had thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made" (57 L. ed. 1396).

In *Chicago, Milwaukee & St. Paul R. R. Co. v. Wisconsin* (1915), 238 U. S. 491; 59 L. ed. 1423, the syllabus reads as follows:

> "The reserved right of a state to amend corporate charters cannot be exercised so as to take the property of a corporation without due process of law."

See, also:

Iowa Telephone Co. v. City of Keokuk (1915 S. D. Ia. E. D.), 226 Fed. 82, to the effect that the power to alter, amend or repeal corporate charters applies only to the *right to be a corporation*, and does not apply to a franchise acquired by a corporation after its formation.

D. The City of San Francisco is bound by the provisions of Section 499 as they existed in 1879, in like manner and to the same extent as a private corporation operating a street railroad.

The last point urged by the defendants against the claim of the complainant to a *pro tanto* exclusive fran-

chise arising from the provisions of Section 499 of the Civil Code, is that the terms "railroad corporations" used in the section do not include a *municipal* corporation which owns and operates a street railroad. It may be said that this is the point most strongly urged by the defendants.

(1) The evil at which the prohibition of Section 499 of the Civil Code was directed was not dependent upon who owned the railroad. A municipally owned railroad is as much within the purpose of the statute as one owned by a private corporation.

The defendants contend that a municipal corporation is not a "railroad corporation" even when operating a railroad and, therefore, is not affected by the provisions of the statute. The question thus presented is one of statutory construction. If any effect be given to the *spirit* of the statute or to its purpose, it is obvious, of course, that the use of a city street by a second street railroad cannot affect the use of the street or the operation and enjoyment of the first franchise any the less because the owner of the second railroad is a municipal corporation. The loss through competition will be as great; the danger to passengers and the inconvenience of operation will be as great. In fact every evil sought to be prevented by the section will be present no less when the second railroad is owned by a *municipal* corporation than when it is owned by a *private* corporation or by a *natural* person.* The use of the same street by a municipal corporation is, therefore, clearly within

* A street railroad operated by a *natural* person is subject to the limitations of Section 499 of the Civil Code and to all of the other provisions of the title of the Civil Code in which that section appears. This is so because Section 511 of the Civil Code provides that:

"When a street railroad is constructed, owned, or operated by any *natural* person, this title is applicable to such person in like manner as it is applicable to corporations."

the spirit of the statute and should be held to be within its letter.

In *In re Board of Rapid Transit Commissioners* (1908), 128 App. Div. 103; 112 N. Y. Supp. 619, it is said (p. 624):

> "A thing within the intention of a statute is within the statute, even though an exact literal construction would exclude it." Citing *Riggs v. Palmer,* 115 N. Y. 506, 509; 22 N. E. 188.

In *Eastern Extension Co. v. United States* (1913), 231 U. S. 326; 58 L. ed. 250, a claim was made against the United States for the annual subsidy provided for in Spanish concessions for the construction and operation of submarine cables in the Philippine Islands. With reference to this claim this court said:

> "Whether the liability asserted is said to result from an express provision of assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty, it is equally within the policy and spirit of the statute; *and the letter of the statute should not be otherwise construed"* (58 L. ed. 255).

In *Pickett v. United States* (1910), 216 U. S. 546; 54 L. ed. 566, it is said (p. 569):

> "The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by a strict adherence to its verbiage."

How much greater the reason for applying the foregoing rule when the letter of a statute is sufficiently comprehensive to include a subject within the spirit of the statute, for it has been frequently held that the term

"corporation" is comprehensive enough to include municipal corporations, and, as we shall hereafter show, the term "railroad corporation" to include a municipality operating a street railroad.

In *Newark v. Funk* (1864), 15 Ohio St. 462, it was held that a statute providing that "any claim or choses in action due or to become due" to a judgment debtor, and all "money, goods or effects" which he might have in the hands of "any *person, body politic or corporate*" might be made subject to the payment of a judgment, was broad enough to include a municipal corporation.

To the same effect, see:

Bray v. Wallingford (1850), 20 Conn. 416;
Adams v. Tyler (1876), 121 Mass. 380;
Wilson v. Lewis (1872), 10 R. I. 285.

So, also, under a statute imposing liability "when death is caused by the wrongful act or omission of any person or *corporation*, the personal representative of the decedent may maintain an action therefor", it has been held that the term "corporation" includes a municipal corporation.

Keever v. Mankato (1910), 113 Minn. 55; 129 N. W. 158.

In *South Pasadena v. Pasadena Land Co.* (1908), 152 Cal. 579; 93 Pac. 490, a question arose as to whether the City of Pasadena which had purchased the property, business and franchise of a water company, a portion of whose water was appropriated to the use of the City of South Pasadena, could continue to serve the inhabitants of South Pasadena. The point was raised that

the City of Pasadena would have no right to enter the City of South Pasadena to lay pipes therein, etc., for the reason that Section 19 of Article XI of the State Constitution providing that in any city where there are no municipal water works for the supply of its inhabitants—"any individual or *any corporation duly incorporated for such purpose*" may lay mains in the streets for supplying such water, would not include a municipal corporation. In answering this contention the Supreme Court of California said:

> "This grant clearly does not, in terms, extend to a municipal corporation. It is contended that it, in effect, forbids the exercise of such privilege by another city. The provision is intended to further the interests of the public and facilitate the supply of water to the inhabitants of the city, and it should be liberally construed to effect that purpose. When the state gives such power to a city that, as an incident to supplying water to its own people, it may furnish water to the inhabitants of another city to whose use a part of the water is dedicated, the *city having such incidental powers should be considered as a 'corporation duly incorporated for such purpose'* " (152 Cal. 594).

In *In re Board of Rapid Transit Commissioners* (1908), 128 App. Div. 103; 112 N. Y. Supp. 619, the court was concerned with the liability of the municipal corporation of the City of New York for damages to abutting owners arising out of the construction of a subway. A statute enacted in 1891 provided for the construction of subways by "*railroad corporations*" then existing or thereafter incorporated.

In 1894 this act was amended so as to permit the City of New York itself to execute the work. It was claimed

that the City of New York was not a "railroad corporation" within the meaning of the original act, and was, therefore, not subject to the liabilities imposed upon "railroad corporations" by the original act, including a liability for damages to abutting owners.

It will thus be seen that the question involved is precisely similar to the one with which we are dealing, to wit, whether a municipal corporation operating a street railroad is a "railroad corporation" within the meaning of a statute relating to "railroad corporations". In disposing of this contention the court said:

> "The city, as a public corporation, or distinct political entity, was endowed by the Legislature with the same powers and privileges which it had sought to confer upon a railroad corporation, and it thus became charged with the same duties and obligations which would have been assumed by a railroad corporation in accepting the franchise. *For all the purposes of the construction of this underground railroad it became a railroad corporation,* having no more rights in the highways and public places of the city than would belong to any other corporation, and with no other or higher right to take private property than would belong to an ordinary railroad corporation" (112 N. Y. S. 624).

This case was affirmed in 197 N. Y. 81; 90 N. E. 456.

(2) A city when operating a street railroad or other public utility is not performing any governmental function.

It should be borne in mind that the city when operating a street railroad is not performing any *governmental* function.

Municipal corporations

> "exercise powers which are governmental and powers which are of a private or business charac-

ter. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred".

Vilas v. Manila (1911), 220 U. S. 345; 55 L. ed. 491, 495.

"When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. *It is performing a function, not governmental,* but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal but the method is not."

28 Cyc. 125.

In *South Pasadena v. Pasadena Land Co.,* supra, the court, speaking of a municipal corporation engaged in furnishing water service, says:

"In the carrying on of the water service to the people of South Pasadena the city of Pasadena will not be acting in its political, public or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi-public capacity." (152 Cal. 592.)

To the same effect see:

Chafor v. Long Beach (1917), 174 Cal. 478; 163 Pac. 670.

See, also:

South Carolina v. U. S. (1905), 199 U. S. 436, 463; 50 L. ed. 261-270.

In the case just cited this court quotes with approval from New York and Pennsylvania cases to the effect that a municipal corporation when exercising *proprietary* powers is a "private" corporation.

To the same effect, see:

Wichita Water Co. v. Wichita (1916, Kan. 2nd Div.), 234 Fed. 415;

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.) 241 Fed. 912.

In the case last cited the City of Los Angeles, which was operating a gas and electric plant, sought by ordinance to compel the removal from the city streets of certain poles and other appliances of the complainant, a gas and electric company, in order that the poles of the municipal system might be placed in their stead. The court held, however, that the city was exercising *proprietary* powers and *could compete with privately owned plants upon the same condition only that a private competitor might compete.* We shall have occasion later to refer to this case at greater length.

To the same effect see:

Vallejo Ferry Co. v. City of Vallejo (1905), 146 Cal. 392; 80 Pac. 514.

See, also:

City of Seattle v. Stirrat (1909), 55 Wash. 560; 104 Pac. 834.

In *In re Board of Rapid Transit Commissioners* (1909), 197 N. Y. 81; 90 N. E. 456, (affirming the decision of the Appellate Division of the Supreme Court), the Court of Appeals of New York said:

> "Was the action of the city in building the subway governmental or proprietary in character? *The city* owns the subway, and it *is a railroad corporation* so far as the construction, operation, and leasing thereof is concerned. * * *
>
> "In other words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. *It was built by and belongs to the city as a proprietor, not as a sovereign.*" (90 N. E. 460.)

Further in the opinion it is said:

> "The city in prosecuting the work, or causing it to be prosecuted through contractors, was not improving a highway, but building a railroad out of which it could make money, and *its liability is that of an ordinary railroad corporation doing the same work in the same way. It can lawfully claim no immunity from liability, except such as would belong to a railroad company, engaged in a similar enterprise, under like circumstances.* Although it was conducting a public work, it was such only and to the same extent as the building of a railroad by a private corporation is a public work. (90 N. E. 464.)

The latter decision was quoted and approved in

Ogden v. City of New York (1910), 126 N. Y. S. 189; and in

People v. Crane (1914), 150 N. Y. S. 933.

In *Omaha Water Co. v. City of Omaha* (1906, C. C. A. 8th) 147 Fed. 1, the court, speaking through Mr. Justice Sanborn, said (p. 5):

> "A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their officers because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. *In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary, powers. The purpose* of such a contract is not to govern its inhabitants, but *to obtain a private benefit for the city* and for its denizens."

McQuillan recognizes the same rule. In his work on *Municipal Corporations*, Vol. IV, Sec. 1801, page 3860, he says:

> "The general rule is that a municipality, in constructing or in operating its municipal plant, acts in a *business proprietary* or *individual capacity* rather than in a *legislative* or *governmental capacity*."

In *Eastern Illinois State Normal School v. City of Charleston* (1916), 271 Ill. 602; 111 N. E. 573, the city was operating a system of waterworks. In the opinion it is said:

> "In supplying water for the use of the inhabitants for domestic and commercial purposes, a municipality is not in the exercise of a governmental power, *but acts in the same capacity as a private corporation,* although the business is carried on for the public advantage, and, being public in its nature, is impressed with a public use." (111 N. E. 575.)

In *Eaton v. City of Weiser* (1906), 12 Idaho 544; 86 Pac. 541, the city was operating an electric light system. Says the court:

> "In its proprietary or private character a municipal corporation may engage in enterprises for its own immediate profit or advantage as a corporation, although inuring ultimately, of course, to the benefit of the public. Of this character are water works, to supply water to consumers; or gas works, to supply gas, on payment of rates or tolls, and other similar enterprises." (86 Pac. 543.)

See, also:

Chicago v. Selz (1902), 104 Ill. App. 376, 381;

Mayor v. Bailey (1845), 2 Den. 433;

Athens v. Miller (1914), 190 Ala. 82; 66 So. 702, 705;

Asher v. Independence (1914), 177 Mo. App. 1; 163 S. W. 574, 576;

Appeal of Brum (1888 Pa.) 12 Atl. 855, 856.

The respondents argued in the trial court that any distinction that may be recognized in the cases between

the *proprietary* and the *governmental* powers of a municipal corporation is recognized for the sole purpose of rendering a municipal corporation liable for torts committed by it in the operation of a public utility. That the principle has no such limited application a review of the authorities makes clear. A typical case in this behalf is

Western Savings Fund Society v. Philadelphia (1858), 31 Pa. St. 175,

wherein the syllabus reads as follows:

> "A city, in supplying gas to its inhabitants, acts as a private corporation, and is subject to the same duties, liabilities, and disabilities. *It cannot impair the obligation of a contract entered into by it, in that capacity, because it may deem it for the benefit of its citizens to do so.*"

In the opinion it is said (p. 183):

> "The supply of gas-light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument,

though the public may derive a common benefit therefrom, *the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.*"

(3) A general law of the state dealing with "corporations" operating public utilities is binding upon a municipal corporation which operates such a utility.

Calloway v. Cossart (1885), 45 Ark. 81, was a suit in which each of the parties sought to quiet his title as against the other.

The defendant claimed title by adverse possession. This claim was challenged by the plaintiff upon the ground that during the time that it was claimed the statute of limitations was running the State of Arkansas was the equitable owner of the land in controversy because it had advanced its bonds to a bank which had formerly owned the property, looking to the assets of the bank for indemnity and security; that the bank had conveyed to trustees for the benefit of its creditors, and since the State was one of the creditors the State was the equitable owner of the property.

In holding this argument untenable, the court said (p. 88):

> "The attitude of the State with regard to this property, or her rights of indemnity in it, was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its credit to the bank. *When a State steps down into the arena of common business in concert, or in competition with her citizens, she goes divested of her sovereignty.* The reason of the maxim, '*Nullum tempus occurrit regi*', no longer applies."

Rains v. The City of Oshkosh (1861), 14 Wis. 403, was an action for the unlawful detainer of certain leased land. The plaintiff alleged that the defendant, a municipal corporation, was in arrears for a year's rent. The action was brought to recover possession of the property. The lower court had held that the action could not be maintained against the defendant for the reason that "an action for an unlawful holding over of demised premises will not lie against a municipal corporation". Upon appeal this point was held to be without merit and the judgment in favor of the defendant was reversed, the court saying (p. 405):

> "Nor do we think the objection well taken, that the action will not lie against a municipal corporation. The language of the statute is general, and applies to any *person* who holds over demised premises after the termination of the lease, or contrary to the covenants thereof, or after rent becomes due; and we have no doubt that the word 'person' extends to municipal corporations. We can conceive of no possible reasons why the statute should not extend to corporations, public or private, for the remedy is quite as essential and necessary against them as against a natural person."

See, also:

Springfield v. Walker (1885), 42 Ohio St. 543, 547.

To the effect that a municipal corporation, in so far as its *proprietary* powers are concerned, is subject to the general laws of a state, see also:

Governor v. Woodworth (1872), 63 Ill. 254.

In this case it was held that the State of Illinois, represented by its governor, was subject to a statute

of limitations to the same extent as would be a private individual. In the opinion it is said (p. 257):

> " * * * when the Government becomes a partner with individuals in the prosecution of some business or enterprise, it divests itself of its sovereign character, so far as related to that business, and takes the character of a private citizen. It does not impart to its associates its privileges and prerogatives, but descends to a level with those with whom it associates itself, and the character which belongs to its associates, and to the business which is to be transacted. * * *
>
> As a member of a corporation a Government never exercises its sovereignty. In such cases it acts merely as a corporation, and exercises no other power in the management of the affairs of the corporation than are given by the act of incorporation. *Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904."

The opinion also quotes from

> *Bank of United States v. M'Kenzie* (1829), 2 Brock. 393; 2 Fed. Cas. 718.

In the latter case the opinion was by Chief Justice Marshall. The question involved and the holding of the court are thus summarized in the syllabus:

> "A state, becoming a partner in business with corporations or individuals, divests itself of its sovereign character and descends to their level instead of imparting to them its own privileges and prerogatives."

To the same effect see:

> *Bank of United States v. Planters' Bank* (1824), 9 Wheat. 904; 6 L. ed. 244 (per Marshall, C. J.).

See also:

Brown v. Trustees (1902), 224 Ill. 184; 79 N. E. 579.

In the latter case it was held that while general statutes of a state and particularly the statute of limitations may not be invoked against a state when exercising a *governmental* power, it is otherwise with respect to the exercise by the state of a *proprietary* power. In the opinion it is said:

> "Statutes of limitation do not run against the state, in respect to public rights, unless the state is expressly included within the terms of the statute. The rule is founded on the maxim of the common law, 'nullum tempus occurrit regi.' It was supposed that the time and attention of the sovereign was occupied by the cares of government, and there could be no negligence or laches on his part. The same prerogative extends to the state, in its sovereign capacity, as to all *governmental* matters. As to them no delay in resorting to the remedy will bar the right, but, if the state becomes a partner with individuals, *or engages in business, it divests itself of its sovereign character and is subject to the statute.* Governor v. Woodworth, 63 Ill. 254. *In such relations it does not exercise sovereignty but acts merely as an individual and cannot claim the exemption.* The rule that statutes of limitation do not run against the state also extends to minor municipalities created by it as local governmental agencies, in respect to *governmental* affairs affecting the general public. The exemption extends to counties, cities, towns, and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, *but as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals.*" (79 N. E. 580, citing many cases.)

On the question here involved the case of *Metropolitan R. R. Co. v. District of Columbia* (1889), 132 U. S. 1; 33 L. ed. 231, appears to us to be conclusive. The District of Columbia sued for work done and materials furnished by it in paving streets in the City of Washington in consequence of the failure of the defendant to do such work and furnish such material in accordance with its duty as prescribed by statute. The defendant interposed a plea of the statute of limitations. The court sustained a demurrer to the plea of the statute of limitations and ordered judgment for the plaintiff upon the theory that a municipal corporation was not subject to a general law prescribing limitations. The statute of limitations relied upon contained a preamble to the effect that,

> "nothing can be more effectual to the peace and tranquility of this province than the quieting the estates of the inhabitants thereof, and for the effecting of which no better measures can be taken than a limitation of time for the commencing of such actions as in the several and respective courts within this province are brought, from the time of the cause of such actions accruing."

The statute itself provided that:

> "All actions sued or brought by any *person* or persons within this province, * * * shall be commenced within three years."

It was contended by the District of Columbia that it was not a "person" within the meaning of this statute. In disposing of this contention this court said (p. 235):

> "Corporations are 'persons' in the law. There is no apparent reason why they should not be included in the statute. It is conceded that private

corporations are included. On what ground, then, can municipal corporations be excluded? Not on the ground that they are not 'persons' for that would exclude private corporations. They are, therefore, within the terms of the law. *Are they not also within the spirit and reason of the law? They are certainly within the reason of the preamble. It is just as much for the public interest and tranquility that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be.* The reason stated in the preamble for the passage of the law applies to all; and, moreover, it shows that the objects of the law are beneficent ones, and, therefore, that it should be liberally construed." (33 L. ed. 235.)

See again:

Keever v. Mankato (1910), 113 Minn. 55; 129 N. W. 158;

In re Board of Rapid Transit Commissioners (1909), 197 N. Y. 81; 90 N. E. 456.

It appears, therefore, that whenever a municipal corporation is engaged in work of a *proprietary* character it is subject to all laws dealing with "corporations" engaged in works of like character.

(4) The cases relied upon by defendants in support of their contention that the term "railroad corporations" in Section 499 of the Civil Code do not include a municipal corporation operating a railroad are readily distinguishable.

The defendants contended in the lower court, and the trial judge held, that the term "railroad corporations" in Section 499 of the Civil Code did not include a municipal corporation operating a street railroad (239 Fed. 994, R. 189). Both court and counsel in support of this position relied upon certain cases of this

court, notably *Knoxville Water Co. v. Knoxville,* 200 U. S. 22; 50 L. ed. 353, and *Madera Water Works v. Madera* (1913), 228 U. S. 454; 57 L. ed. 915. These two cases may be said to be typical of the cases which have denied the right of immunity of a private corporation from competition by a municipal corporation.

(a) The Madera Water Works Case.

The Madera Water Works Company had a franchise under the self-executing provisions of the California Constitution* which gave to *all* gas and water companies the right to freely operate and *compete* within all of the municipalities of the State. The purpose of the constitutional provision was *to prevent exclusive grants* and thereby promote competition. The purpose of the Constitution was to obviate the necessity of a franchise; indeed the Constitution itself was a grant to all who availed themselves of its offer.

Russell v. Sebastian, supra.

Notwithstanding this fact, the water works company claimed that the constitutional provision giving *all* corporations the *right to compete* precluded the City of Madera from constructing its own works. Not only did the constitutional provision which constituted the franchise of the water works company contain no *express* provision excluding competition by the municipality, but, as already stated, it was designed to promote freedom of competition. Necessarily it was held that the water works company had no franchise exclusive as against the city. The difference between such a case and the case at bar is at once apparent. In the

* These provisions were reviewed by this court in Russell v. Sebastian (1914), 233 U. S. 195; 58 L. ed. 912.

Madera case the appellant claimed that a grant *containing no words of prohibition* and intended to promote competition was *in its nature* exclusive. In the present case the complainant relies upon a prohibition contained in a general statute of the State and directed against the "occupation and use" of a street by two railroad corporations. In the *Madera* case the constitutional provision relied upon by the appellant was a grant of power to *all* who availed themselves of it; it contained no limitation or prohibition of any kind. In our case the statute (Sec. 499, C. C.) contains an *express prohibition* against the "occupation and use" of a street by two railroad corporations.

(b) The Knoxville Water Works Case.

In *Knoxville Water Co. v. Knoxville,* supra, the City of Knoxville contracted with the water company for a supply of water and the erection of water works which, after being built, the city was to have the option of purchasing at the time to be agreed upon. The city *covenanted* in the contract "not to *grant* to any other person or corporation any contract or privilege to furnish water to the City of Knoxville", etc. This court adopted the rule of strict construction, and, quoting from *Joplin v. Southwest Missouri Light Co.* (1903), 191 U. S. 150; 48 L. ed. 127, said:

> "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied." (50 L. ed. 360.)

Further in the opinion it is said:

> "It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying

> the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers." (50 L. ed. 361.)

Accordingly the court held that while by its covenant the city was bound not to *grant a franchise* to another corporation, it was not precluded from erecting its own water works and competing with the water company.

Justices Brown, White, Peckham and Holmes dissented.

It should be noted that,

(a) the *Knoxville* case involved the construction of a *covenant* between a municipal corporation and a private corporation; and

(b) the city covenanted not to "*grant any contract or privilege*" to furnish water to the city.

It will be noted at the outset that the *Knoxville* case differs from the case at bar in that the *Knoxville* case involved the construction of a covenant of the city, whereas the present case involves the construction of a statute of the state. It is true that in the present case we are dealing with a covenant in the complainant's franchise. The covenant, however, is to the same effect as the statute which the franchise incorporates by reference. When we have determined the meaning of the statute we have fixed the construction of the

city's covenant because the covenant is co-extensive with the statute.

The rule of strict construction upon which the *Knoxville* case turned, as stated in the opinion of Mr. Justice Harland, requires that no public body "be held upon mere implication or presumption to have divested itself of its powers". A divestiture of power presupposes a self-created limitation, i. e., a voluntary covenant such as was involved in the *Knoxville* case. In that case the court was construing such a covenant made by the city with a water company and considering the claim of the water company that the city *by a self-imposed limitation* had deprived itself of the power to construct its own water-works. In the present case the city claims that a general law of the state in respect of "railroad corporations" does not apply to a municipal corporation operating a railroad, and, therefore, that a covenant of the city incorporating the statute is not binding upon the city. In the *Knoxville* case, the contract was with the city alone and the covenant which was the subject of construction was that of the city, and was *voluntarily* included in the contract. In the present case the contract of the complainant's predecessor was with the State of California; the prohibition against the "occupation and use" of a street by two railroad corporations, although expressly incorporated in the franchise by the city, *was not created by the city.* The prohibition was created by a general law of the State of California and would have been incorporated in the franchise by operation of law even if the city had not *expressly* incorporated it. It follows that the

prohibition in the franchise means precisely what it means in the statute. We have already shown that the prohibition in the statute includes *municipal* corporations operating railroads as well as *private* corporations so engaged. It follows, therefore, that the term "corporation" in the franchise included the city because the same term in the statute included the city.

In another view the *Knoxville* case is inapplicable. The question in the *Knoxville* case was the intent of the makers of a contract. One of the parties to the contract was a public agency, i. e., a municipal corporation. In determining the meaning of the contract, the court was guided by the rule that all intendments are in favor of the public, and that a public agency, i. e., a municipality, will not "be held upon mere implication or presumption to have divested itself of its powers". The question in the *Knoxville* case, as in all cases involving the construction of a contract, public or private, had to do with the intention of the parties. No other guide to the intention of the parties appearing, the court resorted to a rule of construction and resolved the question in the light of that rule. In the present case there are many facts shedding light upon the intention of the legislature in enacting Section 499 of the Civil Code and of the city of San Francisco in incorporating that section in the franchise of the complainant's predecessor. We may draw upon the legislation that preceded Section 499, the purpose of that section in the light of the existing law and the evils sought to be avoided thereby. Particularly are we to consider that a second railroad upon a street would be no less burdensome,

if owned and operated by a municipality than if owned and operated by a natural person or a private corporation. A municipally owned street railroad, as previously argued, would be within the spirit of Section 499 as well as within the letter of that section. For this reason the terms "railroad corporations" in Section 499 should be held to include a municipal corporation and similar provisions in the franchise should likewise be held to include the city of San Francisco.

See

Metropolitan R. R. Co. v. District of Columbia (1889), 132 U. S. 1; 33 L. ed. 231.

The interpretation which includes a municipal corporation within the prohibition of Section 499 and of the franchise which incorporated that section is "a fair and reasonable interpretation" and this being so, there is no necessity for resorting to the rule of strict construction employed in the *Knoxville* case, as the reason for resorting to that rule does not exist.

Russell v. Sebastian (1913), 233 U. S. 195; 58 L. ed. 912, 922.

In determining whether a municipality owned street railroad is subject to a general law concerning "railroad corporations" the solution of the question is not affected by the fact that the suit in which the question arises is one between a private corporation and a municipal corporation. The question would be precisely the same if the present suit were one in *quo warranto* by the people of the State at the instance of the Attorney-general to determine by what right the municipality was operating a street railroad on Market Street

in contravention of the franchise of the complainant. As against the State of California in such a proceeding would it be claimed or held that the municipal corporation was not subject to the general laws of the State concerning "railroad corporations"? We submit that it would not, particularly in view of the fact already shown that municipal corporations exercising *proprietary* powers are subject to general laws.

IX.

IT IS NOT TRUE, AS CONTENDED BY THE DEFENDANTS, THAT THE CIVIL CODE OF CALIFORNIA PERMITS ONE STREET RAILWAY TO CROSS THE TRACKS OF ANOTHER STREET RAILWAY WITHOUT MAKING COMPENSATION THEREFOR AND IT HAS NEVER BEEN SO HELD IN CALIFORNIA.

The defendants contended in the lower court that it is a general rule of law that one street railway may cross the tracks of another street railway without making compensation therefor, and that Sections 469 and 500 of the Civil Code of California relied upon by the complainant did not alter that rule. The defendants also contended that it has been so held in two California cases which we will later discuss.

We will first deal with the argument of the defendants based upon the Civil Code sections and will then review the two cases relied upon by the defendants.

A. The arguments of the defendants in respect of the construction of Sections 469 and 500 of the Civil Code are unsound.

In reply to the complainant's contention that Section 469 of the Civil Code of California required compensa-

tion to be paid by one street railway for crossing the tracks of another, the defendants made two arguments, each of which may be briefly answered. The first argument was that Section 469 referred only to the crossing of a street railway by a "*steam*" railroad.

No such limitation appears in the statute, however, and in addition Section 510 of the Civil Code provides that:

> "Street railroads are governed by the provisions of title three of this part, so far as they are applicable, *unless such railroads are therein specially excepted.*"

The title of the Civil Code referred to is the title in which Section 469, supra, appears. It follows, therefore, that *the provisions of Section 469 apply to the crossing of one street railroad by another, because Section 510 of the Civil Code expressly provides that they shall so apply.* This disposes of one of the arguments of the defendant.

The second argument of the defendants was that Section 500 of the Civil Code did not incorporate by reference the portion of Section 469 of the same code which required compensation for the crossing of the tracks of one railroad by those of another. It will be recalled that Section 500 of the Civil Code provides as follows:

> "Any proposed railroad track may be permitted to cross any track already constructed, *the crossing being made as provided in chapter two, title three, of this part.*"

In "chapter two, title three" referred to in Section 500 is Section 469 of the Civil Code which, among other things, provides that:

> "Whenever the track of one railroad intersects and crosses the track of another railroad, *whether the same be a street railroad,* • • • the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."

Then follows the provision for payment of compensation (a) by agreement of the parties if they can agree or (b) by ascertainment in an eminent domain proceeding if they cannot agree. The defendants argued that Section 500 of the Civil Code above quoted only incorporated so much of Section 469 of the same code as had to do with the *manner* in which the second company should cut the rails of the first, i. e., in such manner "as to permit the passage of the cars on each road with as little obstruction as possible". The trial judge would seem to have so held (239 Fed. 997, R. 192).

No reason appears for so limiting the operation of Section 500, and if the legislature had so intended, it is hard to understand why it did not incorporate in Section 500 the clause of Section 469 dealing with the *manner* of cutting the rails instead of adopting that clause by a reference which is longer than the clause itself.

B. Neither of the cases relied upon by the defendants to support their claim that Section 469 of the Civil Code does not require a street railroad to make compensation to another street railroad when it crosses the latter's tracks so decides, nor was such a question involved in either of the cases.

In the trial court the defendants relied upon two California cases to justify their claim that the com-

plainant was not entitled to compensation for the appropriation of its easement which would result from the crossing of its tracks by the municipal tracks. The trial court cites both of these cases to like effect (239 Fed. 997, R. 192). The two cases are

Market St. Ry. Co. v. Central Ry. Co. (1877), 51 Cal. 583; and

Pacific Ry. Co. v. Wade (1891), 91 Cal. 449; 27 Pac. 768.

A brief consideration of each of these cases is in order.

1. Market St. Railway Co. v. Central Ry. Co.

In this case it appeared that the Market Street Railway Company was operating a street railroad on Market Street under a franchise granted by the legislature in 1857. On October 29, 1875, the Board of Supervisors of San Francisco granted to the Central Railway Company a franchise along Market Street from Turk to Powell Streets (a distance of one block) and thence along Turk and Powell. Under the authority of the franchise the Central Railway Company laid down two tracks on Market Street from Turk to Powell. One of these tracks was on the north side of the Market Street Company's track and five feet distant therefrom; the other was on the south side of the Market Street Company's track and five feet distant therefrom. When the Central Railway Company was about to join its Market Street tracks with its tracks already constructed on Powell Street and on Turk Street, the Market Street Company brought a suit to enjoin the threatened crossing and to prevent the Central Com-

pany from acting under its franchise at all. The theory of the complaint was that the second franchise was utterly void. This contention was based upon the fact that the plaintiff's franchise required it to lay its road in the center of the street and the defendant's franchise was in substantially the same terms. The Supreme Court of California affirmed a decree of the District Court denying an injunction to the plaintiff, and held that if the franchise of the defendant was void for the reasons claimed it was a matter of which the State only could complain and not the plaintiff. The court, in its opinion, does state that the defendant had the right to cross the tracks of the plaintiff, but such holding is merely incidental to the main question decided. Nowhere in the record or in the briefs did the plaintiff claim a right to compensation for the crossing of its track and the appropriation of its easement consequent thereto. Nowhere in the briefs or in the opinion is any reference made to the provisions of the Civil Code above discussed, requiring compensation to be made whenever one railroad crosses the tracks of another. As stated before, the theory of the complaint was that the franchise of the defendant was utterly void. The plaintiff did not admit the validity of the franchise and claim compensation for the easement appropriated in the lawful exercise of the franchise. It can hardly be said, therefore, that this case, because decided after the enactment of the codes, involved the construction of the code sections upon which complainant relies.

2. Pacific Railway Co. v. Wade.

Much less application has the case of *Pacific Railway Company v. Wade* above mentioned, as will be evident

when the facts of the case are stated. The Pacific Electric Railway Company was in the hands of a receiver. The Los Angeles Consolidated Electric Railway Company presented a petition to the Superior Court of Los Angeles County having jurisdiction of the receivership proceeding, setting forth that it had entered upon the construction of a line of road as authorized by a certain franchise, and that in the prosecution of its work it was necessary to intersect the tracks of the Pacific Railway Company *and run along the same for a distance of three blocks.* The petitioner asked for an order allowing it to operate upon the tracks of the Pacific Railway Company for said *three* blocks and directing the receiver to grant the necessary facilities therefor. It also asked that the order fix the amount of compensation which it should pay for the right to use the tracks. Immediately the Pacific Railway Company applied to the Supreme Court of California for a writ of prohibition to prohibit the Superior Court from taking jurisdiction of the petition. The Pacific Railway Company claimed that the right to use its tracks for three blocks would have to be condemned *in an independent eminent domain proceeding;* that it was so provided in Section 469 of the Civil Code, and that the Superior Court in the receivership proceeding was without jurisdiction to entertain the petition. The Supreme Court of California held that Section 469 of the Civil Code did not apply to a case *where the right sought was a right to use the tracks of another company for less than five blocks, but applied only where it was sought to cross the tracks of another company.* The Supreme Court also held that Section 499 of the Civil Code made

specific and *exclusive* provision for the use by one company of the tracks of another company *for five blocks or less,* and fixed the compensation for that use as "payment of an equal portion for the construction of the tracks and appurtenances used by said railways jointly." The difference between the Pacific Railway case and the case at bar is obvious. In the former the second company sought only to *use the tracks* of the first company for *three* blocks, a right which Section 499 of the Civil Code gave it upon payment of "an equal portion for the construction of the track." In the present case the defendants purpose to construct municipal tracks across the tracks of the complainant, and may lawfully do so only upon paying the complainant for the latter's easement thus appropriated, as provided in Section 469 of the Civil Code.

X.

CONCLUSION.

In consideration of the foregoing, we respectfully submit that the decree appealed from should be reversed. Without regard to whether the complainant's franchise is exclusive or not, we submit that the proposed municipal action will violate the constitutional guaranties of the complainant. We therefore submit that the operation of the municipal cars in the manner proposed should be enjoined until compensation to the extent of the "taking" or "damaging" of complainant's property consequent thereon is paid. The Con-

stitution of California requires *payment in advance* for the "taking" or "damaging" of private property for public use.

See:

Vilhac v. Stockton R. Co. (1878) 53 Cal. 208.

San Mateo W. W. v. Sharpstein (1875) 50 Cal. 284.

Steinhart v. Superior Court (1902) 137 Cal. 575; 70 Pac. 629.

Pacific Telephone Co. v. Eshleman (1913) 166 Cal. 640; 137 Pac. 1119.

Respectfully submitted,

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San Francisco, March, 1919.

Appendix.

HISTORY OF CALIFORNIA STATUTORY AND CONSTITUTIONAL PROVISIONS RELIED UPON BY THE DEFENDANTS TO JUSTIFY THE CONSTRUCTION AND OPERATION OF A MUNICIPAL LINE ON MORE THAN FIVE CONSECUTIVE BLOCKS OF A STREET ALREADY OCCUPIED BY THE COMPLAINANT.

The following are the California statutory and constitutional provisions relied upon by the defendants.

Statute March 28, 1870 (Stats. 1869-70, p. 481).

The first statute of California dealing with street railroads was approved March 28, 1870 (Stats. 1869-70, p. 481). This statute empowered the Board of Trustees or Supervisors of incorporated cities and towns to grant street railway franchises, and contained various restrictions upon the manner of construction and various regulatory provisions. The important section of the statute, as far as this discussion is concerned, is Section 1, reading as follows:

> "The Trustees, City Council or Supervisors of all incorporated cities or towns, or the Supervisors of any city or county within the limits of such cities or towns, and the Boards of Supervisors of the various counties outside of such cities or towns, shall have the right to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron railway track or tracks upon any streets or avenues or public highway in said cities or towns, or in said counties, outside of said cities or towns, and to run cars thereon, to be propelled by horses (or otherwise, as hereinafter provided), and to carry passengers or freight thereon; *provided,* that whenever any other railroad or company shall be granted the use of the same street, or any part thereof, they shall pay for the use of the rails

already laid an equal share of the cost of constructing and maintaining the railroad on the street, or part of the street, thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such grant shall be made for more than five blocks in all.*"

Statute April 4, 1870 amending Sec. 1 of Act of March 28, 1870 (Stats. 1869-70, p. 786).

On April 4, 1870, Section 1 of the foregoing Act was amended (Stats. 1869-70, p. 786). As amended it read as follows:

"The Trustees, City Council or Supervisors of all incorporated cities or towns, or the Supervisors of any city and county, within the limits of such cities or towns, and the Boards of Supervisors of the various counties, outside of such cities or towns, shall have the right to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron railroad track or tracks, upon any streets or avenues or public highways in said cities or towns, or in said counties, outside of such cities or towns, and to run cars thereon to be propelled by horses (or otherwise, as hereinafter provided), and to carry passengers or freight thereon; *provided,* that whenever any other railroad or company shall be granted the use of the same street, or any part thereof, they shall pay for the use of the rails already laid, an equal share of the cost of constructing and maintaining the railroad on the street or part of the street thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such joint grant shall be made for more than two blocks in all.*

Statute March 23, 1872 amending Sec. 1 of Statute of March 28, 1870 (Stats. 1871-2, p. 515).

On March 23, 1872, Section 1 of the foregoing Act was again amended (Stats. 1871-2, p. 515). As amended it read as follows:

"The Trustees, City Council, or Supervisors of all incorporated cities or towns, or the Supervisors of any city and county within the limits of such cities or towns, and the Board of Supervisors of the various counties outside of such cities or towns, shall have the right to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron railroad track or tracks upon any streets or avenues or public highways in said cities or towns, or in said counties outside of such cities or towns, and to run cars thereon, to be propelled by horses or otherwise as hereinafter provided, and to carry passengers or freight thereon; *provided,* that whenever any other railroad or company shall be granted the use of the same street, or any part thereof, they shall pay for the use of the rails already laid an equal share of the costs of constructing and maintaining the railroad on the street or part of the street thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such joint grant shall be made in the City and County of San Francisco for more than two blocks in all.*

Civ. Code of Cal. in effect January 1, 1873.

On January 1, 1873, the California codes went into effect, and the foregoing statute of 1870, as amended, was superseded by Title IV of Part IV, Division I of the Civil Code. This Title, the subject of which is "Street Railroad Corporations" embraced Sections 497 to 511. The sections bearing upon the question here involved are Sections 497, 499, and 500, which, as originally enacted, read as follows:

Section 497. "Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the Trustees, Council, or other body to whom is intrusted the government of the city or town under such

restrictions and limitations and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses or mules, unless for special reasons, as hereinafter provided."

Section 499. "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

[This is the section hereinbefore quoted as it existed when the franchise under which complainant claims was granted.]

Section 500. "Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in Chapter II, Title III, of this Part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

Statute March 3, 1876 amending Sec. 497 Civ. Code (Amendts. 1875-6, p. 76).

On March 3, 1876, Section 497 was amended (Amendts. 1875-6, p. 76). The amendment consisted in inserting after the word "mules" in the last sentence, the words "or by wire ropes running under the streets and moved by stationary engines". The amendment, of course, was for the purpose of providing for franchises of cable lines.

Statute February 25, 1891 amending Sec. 497 Civ. Code (Stats. & Amendts. 1891, p. 12).

On February 25, 1891, Section 497 of the Civil Code was again amended (Stats. & Amendts. 1891, p.

12). The amendment consisted in the insertion of provisions permitting electricity as motive power, and giving power to municipal authorities to impose such terms, restrictions and limitations on the use of the streets and the construction and mode of operating the roads as might be deemed necessary for the public safety or welfare.

Statute February 25, 1891 amending Sec. 499 Civ. Code (Stats. & Amendts. 1891, p. 13).

On February 25, 1891, Section 499 of the Civil Code was amended (Stats. & Amendts 1891, p. 13). The section after the amendment read as follows:

> "Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

Statute March 21, 1907 amending Sec. 499 Civ. Code (Stats. & Amendts. 1907, p. 837).

On March 21, 1907, Section 499 was again amended (Stats. & Amendts. 1907, p. 837), and, after the latter amendment, read as follows:

> (Two Lines of Street Railway May Use Same Track.) Two or more lines of street railway, operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such

lease or contract, upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly;

(Extent To Which May Be Used.) "but in no case shall a company owning or operating one line of street railway be permitted to condemn the right to occupy and use the same street or tracks for a distance of more than five blocks consecutively.

(Lines of Different Gauge.) "Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence.

Statute April 24, 1911 amending Sec. 499 Civ. Code (Stats. 1911, p. 1101).

In 1911 Section 499 was amended twice. The two amendments are practically identical in language. The latter approved April 24, 1911, reads as follows:

(Two or More Street Railway Corporations May Use the Same Tracks.) "The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways; but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecu-

tive blocks without the consent of the person or company occupying said portion of the street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly; provided, that any incorporated city, city and county, or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitation before prescribed, over the same ground as may be occupied by such prior track or tracks; provided, the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Pol. Code of Cal. Sec. 4408 in effect January 1, 1873.

In addition to the foregoing, Section 4408 of the Political Code of California at all times since that Code took effect on January 1, 1873, has provided that the common council (board of supervisors) of a municipality has power:

"4. To regulate the streets, wharves, piers, and chutes in the city, and the use thereof."

Charter of San Francisco adopted January 26, 1899, in effect January 8, 1900 (Stats. 1899, p. 241).

By concurrent resolution adopted January 26, 1899, the Charter of the City and County of San Francisco, theretofore ratified by the electors of said city and county, was approved by the Legislature of California. This Charter was in full force and effect on the first Monday after the first of January, 1900, to wit, January 8, 1900. Since the last-mentioned date this charter has been the organic law of the City and County of San Francisco.

In the Charter as originally adopted it was provided in Subdivision 27 of Section 1 of Chapter XXII thereof, that the Board of Supervisors should have power,

> "To regulate street railroads, tracks and cars; to compel the owners of two or more of such roads using the same street for any distance not exceeding ten blocks, to use the same tracks and to equitably divide the cost of construction and expense of maintenance thereof between the owners; to fix, establish and reduce the fares and charges for transporting passengers and goods thereon; to regulate rates of speed and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

Amendment approved February 5, 1903 to Sec. 1, sub. 27 of Chap XXII San Francisco charter (Stats. 1903, p. 586).

The foregoing subdivision was amended on December 4, 1902, and the amendment approved by the Legislature on February 5, 1903 (Stats. 1903, p. 586), and, as amended, now provides that the Board of Supervisors shall have power

> "To regulate street railroads, tracks and cars; to permit two or more lines of street railways,

operated under different managements, to use the same street, each paying an equal portion for the construction and repair of the tracks and appurtenances used by said railways jointly for such number of blocks consecutively, not exceeding ten blocks, to fix, establish and reduce the fares and charges for transporting passengers and goods thereon; to regulate rates of speed, and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

Charter of San Francisco, Art. XII (Stats. 1899, p. 346).

Art. XII of San Francisco Charter deals with the "Acquisition of Public Utilities". The preamble and the first two sections of the article as originally enacted are as follows:

"It is hereby declared to be the purpose and intention of the people of the city and county that its public utilities shall be gradually acquired and ultimately owned by the city and county. To this end it is hereby ordained:

SECTION 1. Within one year from the date upon which this charter shall go into effect, and at least every two years thereafter until the object expressed in this provision shall have been fully attained, the supervisors must procure through the city engineer plans and estimates of the actual cost of the original construction and completion by the city and county of water works, gas works, electric light works, steam, water or electric power works, telephone lines, street railroads and such other public utilities as the supervisors or the people by petition to the board may designate.

In securing estimates of the original cost of the construction and completion of water works by the city and county, the supervisors must procure and place on file plans and estimates of the cost of obtaining from all of the several available sources a sufficient and permanent supply of good pure

water, for the city and county, in order that propositions for the acquisition, construction and completion thereof, and the incurring of municipal indebtedness therefor, may be submitted to the electors of the city and county as hereinafter set forth.

SECTION 2. After such plans and estimates shall have been procured and filed, the supervisors shall, at as early a date as they may deem for the best interests of the city and county, enter into negotiations for the permanent acquisition by the city and county, by original construction, condemnation or purchase of such or any of said public utilities as they may regard most important to the city and county to be first acquired, and to formulate and submit to the electors of the city and county, at a special election, propositions for the permanent acquisition and ownership thereof.

Before submitting propositions to the electors for the acquisition by original construction or condemnation, of public utilities, the supervisors must solicit and consider offers for the sale to the city and county of existing utilities, in order that the electors shall have the benefit of acquiring the same at the lowest possible cost thereof."

Amendment to Sections 1 and 2 of Art. XII of Charter, approved February 5, 1903 (Stats. 1903. p. 591).

By amendment approved February 5, 1903, Secs. 1 and 2 of Art. XII of the San Francisco Charter were amended to read respectively as follows (Stats. 1903, p. 591):

"SECTION 1. Whenever the Board of Supervisors by ordinance, as hereinafter provided, shall determine that the public interest or necessity demands the acquisition, construction or completion of any public utility or utilities by the City and County, or whenever the electors shall petition the Board of Supervisors, as provided in Section 3 of this Article, for the acquisition of any public utility or utili-

ties, the Board of Supervisors must procure from the Board of Public Works, through the City Engineer, plans and estimates of the cost of original construction and completion, by the City and County of such public utility or utilities.

In securing estimates of the cost of original construction and completion of water works, by the City and County, the Board of Supervisors must procure, as hereinabove specified, and place on file plans and estimates of the cost of obtaining, from such sources as the Board of Supervisors may designate as available, a sufficient supply of good, pure water for the City and County."

"SECTION 2. Before submitting the propositions to the electors for the acquisition by original construction or condemnation of public utilities the Board of Supervisors must solicit and consider offers for the sale to the City and County of existing utilities, in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

Amendment to Section 19 of Art. XI of Constitution of California, adopted October 10, 1911.

On October 10, 1911, Sec. 19 of Art. XI of the Constitution of California was amended and since said date has provided as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works including their franchises or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to

regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality expressed by ordinance."

With the adoption of the foregoing amendment the *first* constitutional provision was made in this State for the establishment and operation of public works for "*transportation*". For this reason it is unnecessary to consider the terms of the original section or of an amendment thereto, approved in 1885.

The foregoing constitute all constitutional, statutory and Charter provisions upon which the defendants rely to justify the construction and operation of the proposed municipal line.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 282.

UNITED RAILROADS OF SAN FRANCISCO, APPELLANT (COMPLAINANT BELOW),

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL., APPELLEES (DEFENDANTS BELOW).

OUTLINE OF ARGUMENT FOR APPELLANT.

GARRET W. McENERNEY,
Counsel for Appellant.

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vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL., APPELLEES (DEFENDANTS BELOW).

OUTLINE OF ARGUMENT FOR APPELLANT.*

Appeal by Complainant from Decree for Defendants Entered After Final Hearing in the District Court at San Francisco, Circuit Judge Hunt Presiding.

Complainant's case depends upon the pertinency and the applicability thereto of provisions of the Federal and State Constitutions: (*a*) The impairment of contract clause, and (*b*) The due-process clause applied to prevent the "taking" of private property for public use without just compensation

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*Br. or Brief in this Outline refers to the Brief for Appellant.

in the Federal Constitution; and the provision of the Constitution of California as follows:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." (Art. I, sec. 14.)

The controversy arises out of the existence in San Francisco of two railway systems, (*a*) the one owned and operated by the complainant, and (*b*) the other which came into existence in 1912, owned and operated by the municipality.

At the filing of the bill in this case (June 12, 1916) the municipality threatened to parallel the tracks of the complainant the entire length of the busiest thoroughfare in San Francisco, upon which the complainant is operating under a fifty-year franchise, running out in 1929 or 1932, accordingly as the term of the franchise is computed, from the original grant in 1879 or from a supplementary and enlarging grant in 1882.

The tracks of the complainant are laid pursuant to law, as near to the middle of the street as possible, and the threatened municipal operation was to be upon outside tracks, paralleling the tracks of the complainant for twenty-one blocks, the entire length of Market street, which originates at the city front and ends westward at the foot of Twin Peaks.

The Market Street cars of the complainant carry daily 209,000 passengers, of whom 51,000 ride upon transfers.

It is here to be said that by contract and a consent decree made between the parties in other litigation, the municipality operates on outer tracks from the city front to Kearny street, a distance of *seven* blocks (R., 324-333), and that the only longitudinal interference which is here under attack is upon the remaining *fourteen* blocks. (The parties to this record *jointly* use the outer tracks above mentioned for *five*

of the *seven* blocks and the municipality alone uses the outer tracks on the remaining two blocks.)

The plans of the municipality which the bill of complaint sought to enjoin contemplated not merely a longitudinal interference with the access of the public to the complainant's cars, but also involved a transverse or crossing interference with the right of way.

The circumstances here stated only in outline give rise to the questions involved, which are these:

(*a*) Is there a "taking" or a "damaging" of property in consequence of the longitudinal interference or the transverse interference with the exercise or enjoyment of complainant's franchise?

(*b*) Are the plans of the municipality here sought to be enjoined (including the nullification of appellant's priority rights, *infra*, p. 7, par. 4) in such derogation of the substance of the grant contained in complainant's franchise that this fact, without more, gives rise to the application of the impairment of contract clause.

(*c*) Is it true, as claimed by complainant, that it has an exclusive franchise on Market street for the length thereof, in excess of five blocks, in view of section 499 of the Civil Code of California, effective January 1, 1873, in force at the grant of the franchises of 1879 and 1882, and which then read as follows:

> "Two *corporations* may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad *corporations* occupy and use the same street or track for a distance of more than five blocks."

(*d*) Is the complainant entitled to an injunction considering that the municipality has not solicited and considered offers for the sale to the city and county of the lines of the complainant and has, therefore, not complied with the provisions of section 2 of Article XII of the Charter, com-

pliance with which is a condition precedent to the acquisition of a public utility?

It is our purpose orally to deal with points (*a*), (*b*), and (*c*), and to rest point (*d*) upon the argument found in Brief for Appellant (pp. 90-97).

If the appellant is entitled to an injunction to prevent the consummation of the plans of the municipality here complained of *upon any one of the grounds urged by us*, the ultimate result will be the same, *i. e.*, a remission of the municipality to proceedings in eminent domain brought under State law in State courts and by them finally determined, unless there be a sacrifice of complainant's rights, guaranteed by the Federal Constitution, in which event the adjudication would come to this court for review by writ of error.*

The scope of the injunction would be as effective whether the acts complained of amounted to a "taking" or merely to a "damaging" of property. In our briefs we think we have fully shown that the property involved would be taken and not merely damaged; therefore, we have a case within the due-process clause. If we do not make a case within the due-process clause, we nevertheless have a case within the "damaging" clause of the State Constitution.

The State Constitution differs from the Federal Constitution in the matter of "taking" in several respects.

It has been said by this court that the due-process clause prohibits the taking of property without just compensation paid *or secured* to the owner (Chicago Co. *vs.* Chicago (1897), 166 U. S., 226, 236; Norwood *vs.* Baker (1898),

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* We assume without having investigated the question that the municipality could not condemn in the Federal Court upon cross-bill, but if it should turn out that it could do so, the argument which we make is in no way impaired. (See 234 Fed., 868.)

172 U. S., 269, 277), whereas under the California Constitution it is fully settled that the compensation must be paid first, and that it is not sufficient merely to *secure* the payment. Indeed, it has been held that Code provisions providing for the taking or damaging of property upon the giving of security merely are unconstitutional. (Brief, page 162, for California cases so holding.)

Again, the Constitution of California in terms provides that compensation "shall be ascertained by a jury" unless a jury be waived.

The remedy of injunction inheres in the constitutional *right*, as indispensable to its vindication and preservation.

Wilcox *vs.* Engebretsen (1911), 160 Cal., 288, involved the changing of a grade. The statute under which the work was done provided for preliminary assessment of benefits and damages to which the property owner had the right to object. The objections were passed on finally by the city council. The commissioners who were to assess the damages reported that the plaintiff's property would not be damaged and the city council confirmed the report. Defendants were then proceeding to do the work when the plaintiff, the owner of property abutting upon the street, sued to enjoin the work until compensation to the extent of the damage to be suffered by him should be paid. The defense of the defendants was that the manner of computing the damage, under the statute, *i. e.*, by commissioners and the city council was exclusive. The court, however, held that this was not so but was a mere method of allowing the parties to agree upon compensation. The court further held that if the property owner did not agree to accept the compensation awarded him by the commissioners and the city council, the damages would have to be assessed in a proper proceeding. The court said (160 Cal., 299):

> "He cannot be deprived of this constitutional guararty by the decision of a city council that he is

not damaged. His right to a trial by jury does not depend upon the provisions of the statute but upon the Constitution. The fact that the statute makes no provision for a condemnation suit, except where damages are awarded to the owner and he is unwilling to accept the amount allowed, does not deprive him of the right to a jury trial in cases where no damages have been awarded him in the proceedings. Under the Constitution, the ascertainment and payment of such damages in the mode there prescribed, is a condition precedent to the right of the city to do the public work which will cause the damage. It follows that the property owner has the right to enjoin such work until his damages have been lawfully ascertained and paid in the manner prescribed by the Constitution. (*Geurkink vs. Petaluma*, 112 Cal., 306 [44 Pac. 570]; *Bigelow vs. Ballerino*, 111 Cal., 559 [44 Pac. 307]; *Duncan vs. Ramish*, 142 Cal., 694 [60 Pac. 661]; *Eachus vs. Los Angeles*, 103 Cal., 620 [42 Am. St. Rep. 149, 37 Pac., 750]; 2 Lewis on Eminent Domain, secs. 618, 634, 638.) Consequently, if it should turn out that the change of grade was lawfully ordered, the plaintiff would still be entitled to enjoin the work until his damages, if any, in excess of benefits shall have been lawfully ascertained and paid."

In its last analysis this suit may be said to be one to maintain the *status quo*, leaving eminent domain open to the appellee.

If these events were to come to pass, *i. e.*, injunction here and later eminent domain by the municipality, several propositions would arise, the establishment of any one of which makes a case for injunction here asked.

In the event of eminent domain by the municipality against the appellant it would be open to the appellant (defendant in condemnation) among other things to claim:

1. Damages for longitudinal or transverse interference, or both, arising out of (*a*) a taking, (*b*) a damaging, and (*c*) an impairment of contract for acts in derogation of the grant.

2. Damages for competition losses, the right to which would depend upon the validity of the claim that the appellant has an exclusive franchise for the entire length of Market street, save five blocks.*

3. That under section 499, Civil Code, in the form in force from 1873 to 1891, a railway operation by a second corporation was required to be exercised on the tracks of the first corporation; and that the section did not contemplate or allow an operation on independent tracks:** this in support of our argument that section 499, in its then form is a part of our franchise contract (*infra*, p. 19 foot).

4. That inasmuch as the complainant had been compelled by its franchise (R., 22) and section 498, Civil Code of California, to construct its tracks "as nearly as possible in the middle" of the street, it had acquired that priority of right accruing to those first in point of time, and hence the decree of condemnation would be limited to a change of location of the complainant's tracks so that they would constitute the outer operation, leaving the inner tracks to the municipality.

> "As between two corporations exercising similar franchises upon the same street, priority carries superiority of right * * * if interference and limitation of one or the other are unavoidable, the later must give way."
>
> Edison Co. *vs.* Merchants Co. (1901), 200 Pa., 209; 49 Atl., 766.

To similar effect are

Northwestern Tel. Exch. *vs.* Twin City Tel. Co.

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*The appellant claims that the five-block privilege is more than exhausted by the seven-block operation, which arises out of the agreement and consent decree elsewhere mentioned (See Record, 324-333).

**We have printed a review of the authorities which bear upon the interpretation of section 499 so they may be in form convenient for the court. In our brief (pp. 117-119) we construe the section to contrary effect, but a closer study of the decisions just referred to has altered our view. Either view is sufficient for our purposes in the instant case.

(1903), 89 Minn., 495; 95 N. W., 640.
Tri County Tel. Co. *vs.* Bridgeville Power Co. (1918, N. D.), 167 N. W., 503.
Paris Electric Co. *vs.* Southwestern Tel. Co. (1894, Tex. Civ. App.); 27 S. W., 902.
Brief for appellant, pp. 33, 34.

If these contentions would have been available to us had the municipality sued the appellant in eminent domain, they are available to us to support our claim for an injunction to maintain the *status quo* until these questions shall be adjudged and an equitable and compensatory award made in condemnation.

We proceed to discuss the merits of our case, taking up, first, the damaging of property; second, but briefly, the taking of property; thirdly, the impairment of contract arising out of (*a*) acts in substantial derogation of the grant, and (*b*) by reason of an exclusive franchise for the length of Market street, save five blocks.

At the outset we invoke the rule that the municipality when operating upon its proprietary side, is to be regarded merely as a private corporation, and that we are in law dealing with two private corporations operating street railway systems.

In a controversy between these litigants (the appellant and the municipality) the Supreme Court of California said:

> "The case (is to be) considered, as in every proper judicial aspect it is, simply a controversy between two private street railroad litigants."
>
> United Railroads *vs.* Superior Court (1916), 172 Cal., 80, 82 (foot.)

Municipal corporations

> "exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a gov-

ernmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person."

Vilas *vs.* Manila (1911), 220 U. S., 345.

"For all the purposes of the construction of this underground railroad (the subway) it (the City of New York) became a railroad corporation, having no more rights in the highways and public places of the city than would belong to any other corporation, and with no other or higher right to take private property than would belong to an ordinary railroad corporation."

In re Board of Rapid Transit Commissioners (1908), 128 App. Div., 103; 112 N. Y. Supp., 619, 624.

"The city owns the subway, and it is a railroad corporation so far as the construction, operation, and leasing thereof is concerned. * * *
It was built by and belongs to the city as a proprietor, not as a sovereign. * * *
It can lawfully claim no immunity from liability, except such as would belong to a railroad company, engaged in a similar enterprise, under like circumstances. Although it was conducting a public work, it was such only and to the same extent as the building of a railroad by a private corporation is a public work."

In re Board of Rapid Transit Commissioners (1909), 197 N. Y., 81, 90 N. E., 456, 460, 464.

"In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi-public capacity."

South Pasadena *vs.* Pasadena Land Co. (1908), 152 Cal., 579, 592, 93 Pac., 490.

See also

South Carolina *vs.* U. S. (1905), 199 U. S., 436, 463;

Chafor *vs.* Long Beach (1917), 174 Cal., 478; 163 Pac., 670.

We come now to consider the nature of the property of which the complainant is possessed, and we claim such property rights only as are distinctly and unequivocally established by the decisions of the Supreme Court of California, by which this court will be controlled in the disposition of the question.

The leading case is Appeal of the North Beach & Mission R. R. Co. (1867), 32 Cal., 499, from which there is much but not full quotation in our brief, pp. 25 and 26. The case arose out of a proceeding for widening Kearny street in San Francisco. The Commissioners assessed the sum of $20,000 as benefits against the street railroad (appellant in the case) which was operating in that street. There were four questions presented on the appeal, with the first two of which only are we concerned.

The court states them to be (32 Cal., 505):

> Firstly, whether the appellant has any property, estate or interest within the district deemed benefited? Secondly, if so, whether such estate is capable of being enhanced in value in the proposed widening of Kearney Street, and whether, by means thereof, any substantial benefits can accrue to the company.

Both questions were answered on the appeal in the affirmative. The first question is discussed commencing with the last line of page 505, and running over to line 5 on page 513. The long quotation in our brief (pp. 25-26) is taken from the conclusion of the court's discussion of the first point.

The court next considers the second point, occupying in so doing from line 6 on page 513 to the foot of page 514, and embraced in this discussion is the matter quoted in our brief, page 26, foot.

The court holds that (1) a street railroad operating under a franchise has an easement in the street which is real property and taxable as such; (2) the franchise holder has an estate of substantially the same kind and of equal dignity before the law as an abutting proprietor; and (3) "whatever change in any particular street, therefore, will increase or diminish the travel in its cars, must, directly, in the same

ratio, increase or diminish the value of its easement—its estate in the particular street in which the change is made, and upon which such increase or diminution depends."

Los Angeles Co. *vs.* Hubbard (1911), 17 Cal. App., 646; 121 Pac., 306, is a case similar on the facts and similarly decided. (The Supreme Court denied a rehearing.)

(See Br., pp. 27, 28 for other California cases and cases elsewhere of similar effect.)

It will thus be seen that the Supreme Court of California, in respect of their property rights, has placed street railway proprietors upon the same plane as abutting owners. One of the property rights of an abutting owner guarded and protected in California and elsewhere is the right of ingress and egress to and from his property, without which the abutting owner would be deprived of the full enjoyment of his property. It is the established law in California that *the right of access is property*, and is protected by the constitutional provision against "taking" or "damaging," and this rule has been laid down and enforced in all of the cases in which it has arisen.

(See Br., p. 56, for California cases and pp. 56 to 58 for decisions elsewhere.)

It follows, then, that a right of safe and convenient access to the cars of a street railway is likewise a property right which inheres in every street railway franchise, because it is necessary to a full exercise and enjoyment of the franchise. Indeed, it is the right of all others which gives value and substance to the franchise.

See Brief for Appellant, pp. 29-31.

Morgan *vs.* Louisiana (1876), 93 U. S., 217.

Crocker *vs.* New York (1883), C. Ct. S. D., N. Y., Wheeler, D. J., 15 Fed., 405.

Langdon *vs.* New York (1882), 93 N. Y., 129.

Omaha Horse Ry. Co. *vs.* Cable Tramway Co. (1887), 30 Fed., 324; (1887), 32 Fed., 727; (1888), 33 Fed., 689.

San Francisco Ry. *vs.* Scott (1904), 142 Cal., 222, 229.

It is in order now to speak of the ideas which underlie the constitutional provision.

The decisions in California (and elsewhere) have frequently, and we might say almost invariably, involved cases where the public undertaking was entirely lawful, as in (*a*) Reardon *vs.* San Francisco (1885), 66 Cal., 492; 6 Pac., 317, involving the laying by the municipality of a sewer and the bringing of a street to grade, which inflicted damage upon the property of an abutting owner, and (*b*) Eachus *vs.* Los Angeles Ry. Co. (1894), 103 Cal., 614; 37 Pac., 750, involving the initial establishment of grade levels by the municipality, resulting in damage to the access of an abutting proprietor.

All the decisions in effect declare, and some of them declare in terms, that a constitutional provision prohibiting "damage" of private property for public use

> "means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which, for the benefit of the public, private property is damaged."
>
> Lake Erie R. Co. *vs.* Scott (1890), 132 Ill., 429; 24 N. E., 78.

> "If the public desire to erect works for public use, then the public, the party benefited, must bear the burden" and not impose it upon the property owner.
>
> Gillespie *vs.* South Omaha (1907), 79 Neb., 441; 112 N. W., 582.

> "While public improvements are essential to progress and to the welfare of the race, yet, as the public are to receive the benefits, whether by the opening of streets and public grounds *or by the construction of railways*, the party receiving the benefit should bear the burden. This should not be cast upon others."
>
> Mason Co. *vs.* Wolf (1906, 8th C.), 148 Fed., 961, 963.

"The growing necessities of a progressive age must be met by the exercise of the * * * power of eminent domain.

Petition of Philadelphia St. Ry. Co. (1902), 203 Pa., 354; 53 Atl., 191.

Langdon *vs.* New York (1883), 93 N. Y., 129, 157.

People *vs.* Elk River Mill Co. (1895), 107 Cal., 221, 227.

It is true that the constitutional provision is sometimes dealt with in connection with nuisances (or what might have been nuisances in the absence of statutory authority) as in Richards *vs.* Washington Terminal Co. (1914), 233 U. S., 546.

In some jurisdictions it has been said (see Dana *vs.* Rock Creek Co. (1896), 7 App. D. C., 482, 492-3) that municipal governments performing public functions, as in grading, changing and improving streets, are not liable for these damages, while private corporations using the streets in an extraordinary manner for private profit are liable. No such distinction exists in California, and it is doubtful if it exists in *any* of the States in which the Constitution prohibits the damaging of property without just compensation.

Furthermore, the distinction above noted would not apply in the present case, for we are dealing with a municipality on its purely trading and proprietary side, and it could not draw upon its governmental attributes for immunity from liability.

The physical and longitudinal interference with access in the present case is an injury peculiar to the property here involved, and brings the appellant's case under the operation and within the protection of the constitutional guarantee against "damaging."

Brief for Appellant, pp. 53, 63, for California cases so holding.

Omaha Horse Co. *vs.* Cable Co. (1887, C. C. Neb., Brewer, C. J.), 30 Fed., 324.

Omaha Horse Co. *vs.* Cable Co. (1887, C. C. Neb., Brewer, C. J.), 32 Fed., 727.

Omaha Horse Co. *vs.* Cable Co. (1888, C. C. Neb., Brewer, C. J.), 33 Fed., 689.

Cable Co. *vs.* Omaha Horse Co. (1891), 140 U. S., 692 (dismissed upon stipulation).

Omaha Horse Co. *vs.* Cable Co. (1891), 140 U. S., 674 (dismissed upon stipulation).

Taylor *vs.* Chicago (1887), 125 U. S., 98.

Richards *vs.* Washington Terminal Co. (1914), 233 U. S., 546.

Crocker *vs.* City of New York (1883, C. Ct., S. D. N. Y., Wheeler, D. J.), 15 Fed., 405.

"If by the construction of a railway or other public work *an injury peculiar to a given property* be inflicted upon it * * * then said property may be said to be *damaged.*"

Gainesville R. Co. vs. Hall (1890), 78 Tex., 169; 14 S. W., 259.

It is appropriate now to review the points taken by the appellees here or below in answer to our claim that we are entitled to an injunction against the damaging of our property.

The contentions of the appellees may be said to be sixfold:

(*a*) That by the express terms of the franchise it was made subject to legislation justifying the conduct of the municipality here involved.

(*b*) That the franchise is to be so construed as to carry *by implication* an agreement by the appellant that it should be subject to "all the reasonable and necessary incidents flowing from the operation" of a second street railway line, whether operated by the municipality or by a private corporation authorized under grant from the municipality.

(*c*) That the franchise was always subject to the police power, and that the action of the municipality here challenged is referable to the police power;

(*d*) That under the well-known reserved right to alter, amend or repeal, the municipality is possessed of authority, notwithstanding the franchise, to work its impairment or even its destruction by the ordinances authorizing the construction and operation of street railroads here challenged.

(*e*) That appellant has no "private" property which will be damaged; and, finally,

(*f*) That no injury suffered by appellant is actionable, because the city's railway is not a new servitude upon the street.

We deal with these positions taken by the appellees in the order stated.

The first turns upon the language of section 2 of the franchise, which, however, should be read with section 5. They are as follows (R., p. 23):

> "Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said company, upon such terms, conditions and restrictions are are now imposed, or may hereafter be imposed, by the laws of the State of California, and especially the terms, conditions and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said Company with all of the provisions of said laws is hereby required."
>
> "Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and

> conditions specified in the 499th section of the Civil Code of this State. This section shall apply to persons and companies, as well as corporations."

In reading the two sections above quoted, it is to be observed that the legislation spoken of in section 2 has to do only with the "manner of constructing and maintaining street railroads," that the "terms, conditions and restrictions" there spoken of are of the type mentioned in the enumerated sections of the Civil Code, and that it is plainly contemplated that section 499 of the Civil Code as then in force should be a part of the contract.

It is clear from an examination of these sections that they have neither the meaning nor the effect attributed to them by the appellees. (See Detroit *vs.* Detroit Ry. Co. (1902), 184 U. S., 368-372, foot 384-385; Owensboro *vs.* Cumberland Telephone Co. (1912), 230 U. S., 58; also Grand Trunk Ry. Co. *vs.* South Bend (1913), 227 U. S., 544, quoted from in brief for appellant, pp. 121-123.)

We come now to the point that our franchise is to be so construed as to carry by implication an agreement by the appellant that it should be subject to "all the reasonable and necessary incidents flowing from the operation" of a second street railway line, whether operated by the municipality or by a private corporation authorized under grant from the municipality. This argument of the appellee, in our opinion, reverses the logic applicable to the case. We insist that all the reasonable and necessary incidents to the enjoyment of the first franchise are to be protected, and that any act contemplated by the State or municipality in derogation of those incidents involve an impairment of the obligation of the contract, and amounts to either a taking or damaging of property, or both.

> "It will never be presumed that reasonable men accepted a grant carrying with it so comprehensive a negation. It is against the rules, both of law and of reason, to admit by implication in the construction

of a contract a principle which goes in destruction of it."

Murray *vs.* Charleston (1877), 96 U. S., 432.

See also

Pumpelly *vs.* Green Bay Co. (1871), 13 Wall., 166, 182.

Eachus *vs.* Los Angeles Ry. Co. (1894), 103 Cal., 614.

Omaha Water Co. *vs.* Omaha (1906, 8th C.), 147 Fed., 1, 13-14.

Airline Ry. *vs.* R. R. Commission (1907, C. C., D. Ala.), 155 Fed., 792, 802-803.

Dealing with the appellee's contention that the ordinances here complained of are referable to the police power, and that the franchise of the appellant was subject to the exercise of the police power, we answer, first, that the action here involved is not referable to the police power (Br., pp. 136-143—particularly Los Angeles Gas Co. *vs.* Los Angeles (1917, S. D. Cal.), 241 Fed., 912). And furthermore, the police power cannot be drawn upon for the accomplishment of the destruction and damage of the property of the appellant. (See Br., pp. 121-127.)

The contention of the appellee made below, that the municipal action here challenged was justifiable under the constitutionally reserved power to amend, alter and repeal, is sufficiently dealt with in our brief, pages 128-131, and in addition, the municipality is not authorized to exercise the constitutionally secured right of amendment, alteration and repeal.

The appellee's argument that the appellant has no "private" property which is being damaged has already been answered (*supra*, pp. 10, 11).

To the appellee's argument, based upon the contention that the city's railway is not a new servitude upon the street,

we answer that that fact is immaterial (Fairchild *vs.* Oakland Ry. Co. (1917, Col. Sup. Ct.) 167 Pac., 388).

Having now dealt with the theories upon which we rely for an injunction against the damaging of our property without compensation first paid, and having likewise considered the contentions of the appellees in reply thereto, we pass to another point.

We come now to the question whether there is a "taking" of the complainant's property. This matter is discussed in our Brief, pages 45 to 51, and we rely upon the authorities there found, notably Pacific Telephone Co. *vs.* Eshleman (1913), 166 Cal., 640, 665; 137 Pac., 1119, 1127.

At page 47 of our brief we call attention to a note in Lawyers' Reports, Annotated, in which it will be found that the preponderance and weight of authority declare that wherever a right of access to property is held to be property itself, the cutting off or impairment of such access is a "taking" of property. This is precisely our case.

We come now to our proposition that the plans of the municipality here sought to be enjoined are so in derogation of the substance of the grant that this fact, without more, gives rise to the application of the impairment of contract clause.

One of the chief features in this case is an inconsistency of argumentation which may be the better understood if both angles of approach be stated.

The appellant claiming by grant insists that it is unlawful upon the part of the grantor (whether State or municipality) to do any act inconsistent with the grant (substantially impairing the exercise or enjoyment thereof) and that hence it is of first and controlling importance to consider what is involved in the grant, and having ascertained that fact therewith to weigh the plans of the municipality.

On the other hand, the municipality argues that it "reserved" the right of competition, and that any act done in the enjoyment of the municipality's so-called right of competition is lawful, even if it impair, and possibly if it destroy, all property rights claimed by appellant under its franchise.

In no true sense did the municipality "reserve" any right of competition. If, after the grant, the municipality had authority to compete, that authority is not referable to a "reservation."

Moreover, if the municipality has authority to compete, its power to compete exists abstractly and cannot be applied concretely, unless it is *merely* competition when so applied concretely. Circumstances might exist, the *locus* might be peculiar, competition abstractly considered when applied concretely might work destruction of rights already vested. In these events the municipality would be without authority to compete, using that word as involving destruction of the property of others when competition is applied concretely to a particular case.

These views are in accordance with all the authorities which do with the unlawfulness of derogating from one's own grant. (See Brief, pp. 30, top, and 41; Crocker *vs.* City of New York (1883, C. Ct., S. D. N. Y., Wheeler, D. J.), 15 Fed., 405.

If, therefore, the grantor of this franchise, State or municipality, having conveyed to the appellant certain property rights, seeks now by the ordinances here under review to derogate from the grantee's enjoyment of the things conveyed, a case of impairment of contract is presented.

We come now to the contention of appellant that it has an exclusive franchise on Market street for the entire length thereof, in excess of five blocks, in view of section 499 of the Civil Code of California, effective January 1, 1873, in force at the time of the granting of the franchise of 1879 and 1882, the text whereof appears hereinabove and in the Appendix to Brief for Appellant.

This question gives rise at the outset to two considerations highly important to the discussion (*a*) whether the term "railroad corporations" in section 499 covers municipal corporations operating railroads and (*b*) whether the section entered into our franchise as a part thereof.

We have already shown that the term "railroad corporation" does embrace municipal corporations operating railroads, and we therefore pass from question (*a*) to question (*b*) just stated.

Did the provisions of section 499, Civil Code, enter into the appellant's franchise when granted in 1879?

Pacific Ry. Co. *vs.* Wade (1891), 91 Cal., 449, 27 Pac., 768, involved two street railways in Los Angeles. The grantee of the *first* franchise, which was for a cable road, had built its tracks and was operating its cars thereon. The grantee of the *second* franchise, which was for an electric road, wished to intersect the tracks of the cable road "and run along the same for a distance of *three* blocks." The court held that the electric road was entitled to do so, saying:

> "The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. * * * The right * * * of the mayor and council to grant to another street car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, *entered into its contract with the city,* as fully, under the provisions of section 499, Civil Code, *then in force,* as if the condition had been expressly stated in the grant."

(The significance of the words *"then in force"* will be made the more apparent if it be noted that (*a*) the above decision was rendered September 30, 1891; (*b*) section 499, Civil Code, had been amended February 25 1891, as shown in Appendix to Brief for Appellant, p. v; and (*c*) the section as thus amended is quoted in the above decision. Note, also, that in the instant case the franchise expressly incorporates section 499, Civil Code (R., 23).

In Los Angeles Ry. Co. *vs.* Los Angeles (1907), 152 Cal., 242; 92 Pac., 490, it was held that the provisions of section 502 of the Civil Code entered into and became a part of all street railway franchises, and it was held by the Supreme Court of California, in St. Helena *vs.* San Francisco Ry. Co. (1914), 24 Cal. App., 71; 140 Pac., 600, in denying a rehearing, that section 498 of the Civil Code entered into and became a "constituent part of the contract granting the franchise, though not expressed therein in terms."

If, however, we are not to abide by these decisions of the Supreme Court of California, but deal with the matter as a practically open question, we shall come to the same end.

Section 499 presents a question which should be stated, (although its resolution either way will not affect the question in hand), *i. e.,* does section 499 of the Civil Code, in form from 1873 to 1891, totally forbid a second operation (by a different management) on independent tracks for any distance whatever, and permit such an operation on the same tracks for five blocks only. It is not disputed that it forbids a second operation under a different management for a greater distance than five blocks (See People *vs.* Rich (1879) 54 Cal., 74), and the question just suggested is whether the second operation is to be upon the same tracks or upon different tracks, or upon either* •

The obvious meaning of section 499 is that a franchise for the first operation on the street shall be subject to a second operation on the same street by a different proprietor, upon the conditions specified in the section, as restricted by the limitation therein contained. The obvious purpose of the section, in the light of its history, and as sharply defined by later amendments, was to prevent not four tracks upon the street but *to prevent two operations by different proprietors,* except under the circumstances and upon the conditions specified in the section, subject always to the limitations

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* See "Review of Decisions in California" bearing upon the interpretation of Section 499, Civil Code, California, and earlier footnote on this subject.

therein contained. The fact that the section did not limit the amount of operation by a single proprietor, is clear evidence that the provision creating the five blocks limitation was designed to protect the grantee of the first franchise. It is evident that it was so understood at the time of the granting of our franchise, for it is provided therein that the franchise shall subsist "upon the terms and conditions specified in the 499th section of the Civil Code of this State, Br., p. 77, quoting R., 23.

In our brief we have called attention to the cases which hold that under similar circumstances statutes enter into the contract (Br., pp. 80-83).

See also

McCracken *vs.* Hayward (1844), 2 How., 608.
Airline Ry. *vs.* R. R. Commission (1907), 155 Fed., 792.
Crocker *vs.* New York (1883), 15 Fed., 405.
Langdon *vs.* New York (1883), 93 N. Y., 129.
Boston Corporation *vs.* Salem R. R. (1854), 2 Gray, 1, 29.

In the court below the appellees relied with great confidence on Knoxville Water Co. *vs.* Knoxville, and kindred cases, and the decision below rests partly thereon.

We have discussed the Knoxville case and another in our brief, pp. 150-155, but a word or two may be appropriately added here.

The Knoxville case and kindred cases involve the interpretation of writings. No one case can be said to be controlled by another case involving the interpretation of writings, the clauses not being the same and the surrounding circumstances drawn upon for interpretation not being the same.

The principles invoked in the Knoxville case are unchallenged law everywhere, and it is not too much to say that this court did not divide in the Knoxville case upon the soundness of the principles invoked, but upon the applica-

tion of those principles in the interpretation of the contract between the parties there involved.

It is furthermore to be said, speaking of the Knoxville case, that in the instant case we are interpreting not the act of a contracting municipality but an enactment of the law-making power of the State, and the question is, does the language employed by the law-making power in dealing with "railroad corporations" include municipal corporations when they are operating as railroad corporations.

In the Knoxville case this court was dealing with a contract, in the preparation of which both parties took part, the language of which was attributable to both. In the present case we are dealing with an enactment of the legislature, in which the appellant took no part, and the language of which is in no wise attributable to the appellant. (See Knoxville Water Co. *vs.* Knoxville (1906), 189 U. S., 434; Omaha Water Co. *vs.* Omaha (1906, 8th C.), 147 Fed., 1, 13-14.)

The question here is whether an enactment of the legislature of the State, dealing with railroad corporations, applies to a municipal corporation when transacting the business of a railroad corporation.

The Knoxville case and the case at bar, we submit, afford no analogy.

If section 499, Civil Code, does apply to a municipal corporation when transacting the business of a railroad corporation, and if section 499 is a part of our franchise, the Knoxville case can play no part in the disposition of the case; on the other hand, if section 499 does not apply to municipal corporations when operating as railroad corporations, or if so applying is not a part of our franchise, we have failed to make out our case so far as it rests upon our contention that we have an exclusive franchise, quite regardless of the Knoxville decision.

The questions already considered by us are the leading questions in the case, but there are others, including the one

in reference to the taking or damaging of property by crossing our tracks, with which we would care to deal.

The limitations of time, however, forbid the discussion of other questions.

We must leave them, including the question of crossing, upon the arguments and authorities in our brief, adding, however, that it is decided in Boca R. R. Co. *vs.* Sierra Valley R. R. (1905), 2 Cal. App., 546; 84 Pac., 298, that the right of one railroad to cross the tracks of another can only be obtained in an eminent domain proceeding upon compensation paid.

GARRET W. McENERNEY,
Counsel for Appellant.

WASHINGTON, D. C., March 24, 1919.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 282.

UNITED RAILROADS OF SAN FRANCISCO,
APPELLANT (COMPLAINANT BELOW),

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL.,
APPELLEES (DEFENDANTS BELOW).

BRIEF FOR APPELLEES.

Statement of Facts.

Complainant is the successor in interest of the Market Street Railway Company, to which company a franchise was granted by the City and County of San Francisco, on September 20, 1879, granting to said company, its successors and assigns, the right to construct, lay down, maintain and operate, for the term of fifty years, a single or double track street railroad, with all the necessary switches and turnouts, along certain streets in San Francisco, including Market street, from the City Front to Seventeenth street.

The sections of said franchise which are material to this controversy are as follows:

> "Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing

section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said company, *upon such terms, conditions and restrictions as are now imposed, or may hereafter be imposed, by the laws of the State of California,* and especially the terms, conditions, and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said company with all of the provisions of said laws is hereby required."

"Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this State. This section shall apply *to persons and companies, as well as corporations.*"

"Section 12. Said railway company is hereby required to file in the office of the Clerk of the Board of Supervisors of the City and County of San Francisco, an acceptance, in writing, of the provisions of this order, under its corporate seal, signed by its President and countersigned by its Secretary, and thereupon the provisions of this order shall be taken and deemed to be a contract between said Company and said City and County. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void."

At the time the aforesaid franchise was granted section 499 of the Civil Code of the State of California read as follows:

"499. Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

The above section was amended in 1891, 1907, and 1911. The several amendments are set forth in full in appendix to appellant's brief. The section as last amended and in force since 1911 is as follows:

> "The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways, but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecutive blocks without the consent of the person or company occupying said portion of street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly; *provided that any incorporated city, city and county, or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks* upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Prior to the commencement of this action, complainant and its predecessors in interest had constructed a double-

track street railroad on Market street, from the City Front to Seventeenth street. At the time of the commencement of said action complainant was in possession of such railroad and was operating the same by means of the overhead electric trolley system.

Lower Market street, from the City Front to Geary street, a distance of more than five blocks, was, prior to the commencement of this action, and now is, occupied by four parallel tracks, the two outer being used jointly by complainant and the City and County of San Francisco, under an agreement between them, which agreement has been introduced in evidence herein (Tr., 324). The remainder of Market street, from Geary and Kearny streets to Seventeenth street, was at the time this action was commenced occupied only by the two tracks of complainant.

In 1912 the City and County of San Francisco commenced the operation of a municipal street railroad system. The municipal system has been gradually developed and enlarged until it now covers approximately forty-three miles of single-track construction. In further development of such system the city proposed at the time of the commencement of this action to lay outer tracks on that portion of Market street which had but two tracks, and to operate on such tracks the cars of its municipal system on either side of the tracks of complainant.

The lines of the municipal system to be thus developed and created are the following, viz:

First. The so-called Van Ness Avenue and Church Street line, which traverses Van Ness avenue to Market street, thence on Market street between Van Ness avenue and the intersection of Market street and Church street, thence on Church street to a terminal at Thirtieth and Church streets.

Second. The so-called Tunnel line, which, using the existing tracks of the so-called Geary Street line from the Ferry to Geary and Market streets, traverses Market street from the Ferry to the intersection of Seventeenth, Castro and Market streets, which point is the easterly portal of the Twin Peaks

Tunnel, thence through the tunnel to terminals west of Twin Peaks. On that portion of Market street between Van Ness avenue and Church street the cars of the Tunnel line use the same track on which the cars of the Van Ness and Church Street line are operated. Subsequently, in this brief a more detailed description of these lines, as well as the purpose thereof, will be outlined. [For a map showing the routes and streets over which these lines traverse, see map between 284 and 285 Tr.]

The city was beginning the construction of the first portion of these lines on Market Street line when this action was commenced. A temporary restraining order was issued enjoining such construction, which was dissolved at the trial. The purpose of the action is to permanently enjoin the construction by the city of any additional tracks on Market street. The relief asked is that the city be enjoined from constructing the proposed branches of its municipal railway upon Market street and the other streets described in the bill of complaint, and also be enjoined from cutting the tracks of complainant which join its intersecting lines with its main line on Market street.

The answer of the city and its officers admits the purpose of the city to construct and operate the lines of street railway, as above set forth, but denies the alleged facts as to blanketing the complainant's cars and denies any taking of complainant's property or any impairment of the obligation of complainant's contract. The answer further sets forth certain facts showing the necessity for the construction of the tracks of the municipal railway on Market street as proposed.

Such necessity is admitted in paragraph XXIX of complainant's amended bill of complaint in the following language:

> "If the defendant City and County of San Francisco builds and completes its proposed line on Church street and Market street, between Church street and Van Ness avenue, connecting therewith its line on Van Ness avenue, it will serve a territory

which is densely populated, and if it builds and completes its proposed line on Market street, between Kearny street and Van Ness avenue, connecting with its proposed Church street and Van Ness avenue line, it will, upon the completion of a tunnel through Twin Peaks, now in course of construction, and through which it is proposed to build a street railroad line, serve territory of said city and county which is now without direct service to Market street, and which is already well populated, and in which the population is rapidly increasing."

Transportation Problem Facing the City at the Time This Action Was Instituted.

At the outset we desire to present the serious transportation problem facing the City and County of San Francisco at the time the city determined to build the lines complained of. We believe it is important that the court should comprehend this situation then existing, for we shall hereafter present argument supporting the action taken by the city, and that taken by the State in amending section 499 of the Civil Code, as proper exercises of the police power of the municipality and the State in furtherance of the public welfare. The existing situation shows that the action taken was not arbitrary or unjust, but was demanded by the public interest and welfare.

San Francisco is built upon the northern end of a hilly peninsula. The street plan was laid out to meet the peculiar topography of the city and to furnish highways for traffic leading from the doorway of the city—the ferry terminals at the foot of Market street. This street plan is best observed by an examination of the map showing the lines of the United Railroads and of the Municipal Railways at page 284 of the transcript of record.

A very large proportion of the people entering or leaving the city do so by way of Market street. This street extends in a general northeasterly and southwesterly direction

through the heart of the business section. The streets on the northwesterly side of Market street extend in northerly and southerly and easterly and westerly directions, the street lines forming acute angles with Market street on the first intersecting side. The natural topography of the city, with the street plan as shown, has resulted in making Market street the great artery of traffic and activity of the city. Probably no other large city in this country is so dependent upon one central street as is San Francisco.

The street was laid out with considerable forethought for the future traffic. Its width between property lines is 120 feet and from curb to curb 76 feet. With the municipal tracks, there are now four tracks of street railway on the street. The distance from the curb to the nearest rail of the outer track is 18½ feet (Tr., 91, 92). The growth and development of San Francisco has been rapid and extensive. Since the adoption of order number 1514, granting to the Market Street Railway Company of San Francisco the right to operate a street railroad on Market street, the section of the city on the northwesterly side of Market street and most of that portion north of Golden Gate Park has been closely built up. Portions of the Sunset district south of Golden Gate Park are heavily populated and rapidly growing. New residence tracts, known as Forest Hill, St. Francis Wood, Claremont Court, Merritt Terrace, El Portal Tract, and others have been laid out and some of them extensively developed in the section designated on the map referred to as Rancho San Miguel (Tr., page 278). Ingleside Terrace district lies immediately south of the Rancho San Miguel. Parkside Tract lies north of Rancho Laguna de la Merced and was developed as a residence district a number of years ago, but not rapidly settled up because of the lack of adequate transportation facilities. The testimony of A. S. Baldwin, a witness for defendants (Tr., pages 278 to 282), describes the growth and development of these outlying districts.

Street car transportation from this section of the city was

by circuitous routes until the city constructed a tunnel approximately 12,000 feet in length under the range of hills separating this section from the heavily built business district down town. The cost of this tunnel, amounting to approximately four millions of dollars, was paid for through assessments levied on the property within a district formed for that purpose. The greater portion of this tax was paid by the property owners to the west of the range of hills through which Twin Peaks Tunnel was bored.

The Church street line built by the city connects with Van Ness avenue line by tracks laid on Market street. This line reaches into a district formerly suffering from lack of transportation facilities. (Testimony of M. M. O'Shaughnessy, City Engineer, Tr., page 286).

The necessity for furnishing better street railway transportation on Market street and to these residence districts is shown by the testimony of a number of witnesses. City Engineer O'Shaughnessy testified relative to the district served by the Church street line as follows:

> "The Church street line figures prominently for two reasons: One is that it covers a district where present lines are very remote, an undeveloped section; secondly, it is the only street with feasible grades north and south that is not occupied by an existing franchise. It was the only gate or doorway that was open to the city to build a street railway in this section of the city, and the people from this section came into the Board of Supervisors when we were considering the construction and extension of railway lines and demanded that they get better service in that section and that the city build a line there.
>
> "With reference to the adequacy of street railway service in that section at certain times in the day—in the morning and in the evening—the conditions four years ago were practically intolerable. The people could not get to or from their work on account of the congestion on the cars and there was a demand for relief from the city authorities. * * *

"Having particular reference to the Church street line, it is proposed by the city to extend this line from its present terminus at Sixteenth street northerly to Market street, and then down Market street to Van Ness avenue" (Tr., page 286).

Relative to plans for using Twin Peaks Tunnel, the same witness testified as follows:

"It is the hope to give to the people who pay the assessment and put up their money to get service, a rapid transit electric street railway service through the tunnel as soon as it is completed. It is proposed that the cars after coming out of the easterly portal of Twin Peaks Tunnel shall go down Market street. That is the only way at present of getting to the center of the city with the present amount of traffic. Of course, when business expands and a large population exists out in this section of the country, possibly 150,000, then cars cannot be taken on the surface down Market street, but they will have to be taken either depressed or elevated, but at present such a construction would not be justifiable. In my opinion, the present surface road on Market street is the only relief these people can get in the way of service.
* * *

"With reference to the demands that were made by residents of this portion of the city for the construction of the tunnel and the improvement in street car service, I know that they have been very insistent with the Supervisors and municipal administration, and that they were absolutely compelled to proceed with this project and give the city the service and opportunity for development and growth which it needs" (Tr., pages 287, 289).

A. S. Baldwin, a witness for the defendants, testified relative to the street railway service from the new tracts laid out on the section shown on the map as Rancho San Miguel as follows:

"With reference to the street railway service in the portion of the city which I have just been discussing, I think that considering the route that the roads have

to take to get there, it may be fairly adequate, but the service, as I understand it, is a 12 to 15 minute headway. The routes that the road must take, with hardly any exception, are so indirect that they result in not giving the proper service. In other words, there is no inducement hardly to anybody to go out there to live except with the expectation of obtaining more direct and better service in the future. That expectation is the hope of service through the Twin Peaks Tunnel, now in course of construction, and which is to be finished by next year" (Tr., page 279).

Again, on page 280:

"I think that the lack of development of the portion of the city west of Twin Peaks is due to lack of adequate transportation, and except for our belief in that, we certainly would not have invested as heavily as we have to build the tunnel. The tunnel is being built entirely by the property owners and the people who own property west of the west portal are contributing over three million dollars towards its construction. In my opinion, the Twin Peaks Tunnel is the solution of the traffic condition there. The tunnel will be 11,800 feet long and will cost about four million dollars. The interests which I represent and myself are relying and hoping for a trolley line, through the tunnel, that will take us down through the heart of the city, to the ferry. The natural way from the mouth of the tunnel to the heart of the city, if it is a surface line, is Market street. I can see no alternative" (Tr., page 280).

C. C. Young, a witness for the city, testifying relative to St. Francis Wood, said:

"From my contact with prospective buyers and my efforts in making sales, I know that it is practically impossible to make sales now with the present car service, owing to the length of time it takes to reach the property. If the time were cut in two, I would expect the tract to fill up at once. I have had that objection made by prospective purchasers hundreds of times. We will have between six hundred and

seven hundred lots in the tract. We would hope to see practically all of it sold—a large portion of it built on within the next four or five years if adequate service were had. The idea we have always had is to get that service through Twin Peaks Tunnel" (Tr., page 283).

The building of the outer tracks on Market street was planned for the double purpose of furnishing much needed transportation for rapidly growing residence districts and to relieve congestion on the already overcrowded lines of complainant's road on the street. This lack of necessary transportation lines and the extreme congestion on the Market street line of the company is vividly presented in the communication from the United Railroads of San Francisco to the Board of Supervisors, set out in full at pages 311 to 315 of transcript of record. The communication was sent to the board in response to certain inquiries made of the company by the Board of Supervisors, contained in Journal Resolution No. 1600, Tr., pages 315-317. In part the communication from the company is as follows:

United Railroads of San Francisco,

58 Sutter Street,

President's Office.

SAN FRANCISCO, January 11, 1915.

To the Honorable the Board of Supervisors of the City and County of San Francisco.

DEAR SIRS: In acknowledging receipt of the resolution adopted by your honorable board last week, we beg to answer the questions contained in that resolution as follows:

First.

The present policy of the United Railroads in the matter of the extension of existing lines would be to meet the conditions of the growth of the city, were

such a policy practicable. But unfortunately, by reason of the restrictions contained in the charter, it is impossible for any private corporation to finance the construction of any street railroads in any part of the city. These charter conditions may be briefly referred to as follows:

a. Minimum wage scale, $3.00 for eight hours, with time and a half for overtime.

b. Reversion of all physical property to the city at the end of the franchise period, which is limited to twenty-five years.

When to this condition is added the heavy tax burden, it makes an impossible financial proposition.

Second.

The answer to this question is largely covered by the answer to the first. It should be stated, however, that wherever the company is operating existing lines it is prepared to add additional rolling stock as the traffic demands.

It cannot be denied that during the so-called "rush hours" the cars are overcrowded, but it is not true that by simply increasing the number of cars this condition can be ameliorated. On those lines to which this criticism is particularly directed, the addition of cars would only tend to make a bad matter worse by reason of the fact that the capacity of the tracks in the down-town section, where the overcrowding is greatest, has already been reached, and adding cars would tend to decrease the schedule speed so much that the number of persons which we could carry by a given point within a given time would also be decreased.

This condition of overcrowding will be found in practically every city having a population exceeding 100,000. It is a problem confronting every street railroad operator, and no question in connection with city transportation has been given more careful study.

In New York City, for instance, the transportation problem prior to the construction of the subways was the most serious matter confronting the municipality. It was thought that when the subways were com-

pleted the problem would be solved, but, although they have been in operation for several years, the present conditions are fully as bad as they were prior to their construction, and during the rush hours the overcrowding of the subways, surface lines and elevated railroads are far in excess of anything San Francisco has ever experienced.

Extending the lines of this company into the outlying districts or the reconstruction of any roadbed will in no way solve the problem of the rush-hour congestion.

* * * * * * *

Finally, we beg leave to say that the public is entitled to adequate transportation facilities, and, to the extent that private capital cannot or will not build the necessary extension, it is not alone the right but the duty of the city to furnish same, and we would not, if we could, do anything to obstruct the fulfillment of that duty.

Trusting in this way to have furnished your honorable board with the desired information, we beg leave to remain,

Yours very respectfully,

UNITED RAILROADS OF SAN FRANCISCO,

By JESS W. LILIENTHAL,

President.

J. W. L./A. C.

Points and Authorities.

I.

Grants of special privileges are always construed strictly in favor of the public. "Whatever is not unequivocally granted is withheld; nothing passes by mere implication." Knoxville Water Co. *vs.* Knoxville, 200 U. S., 22-34; 50 L. Ed., 353-359; Madera Water Works *vs.* Madera, 228 U. S., 454; 57 L. Ed., 915; Tillamook Water Co. *vs.* Tillamook, 139 Fed., 406; Tillamook Water Co. *vs.* Tillamook, 150 Fed., 119; Blair *vs.* Chicago, 201 U. S., 400-472; 50 L. Ed., 801-831; Boise City *vs.* Boise Water Co., 186 Fed., 705; Central

Trust Co. *vs.* Municipal Traction Co., 169 Fed., 308; Cleveland Electric Ry. Co. *vs.* Cleveland, 204 U. S., 130; 51 L. Ed., 405; Curtis *vs.* Whitney, 13 Wall., 68; 20 L. Ed., 513; Stein *vs.* Bienville Water Supply Co., 141 U. S., 67; 35 L. Ed., 622; Long Island Water Supply Co. *vs.* Brooklyn, 166 U. S., 685; 41 L. Ed., 1165; Joplin *vs.* Southwest Missouri Light Company, 191 U. S., 150; 48 L. Ed., 127; Freeport Water Co. *vs.* Freeport, 180 U. S., 587; 45 L. Ed., 679; Danville Water Co. *vs.* Danville, 180 U. S., 619; 45 L. Ed., 697; Rogers Park Water Co. *vs.* Fergus, 180 U. S., 624; 45 L. Ed., 702; Covington & Lexington Turnpike Road Co. *vs.* Sanford, 164 U. S., 578; 41 L. Ed., 560; Water, Light & Gas Co. *vs.* Hutchinson, 207 U. S., 393; 52 L. Ed., 257; Detroit Citizens' Street R. Co. *vs.* Detroit R. R., 171 U. S., 48; 43 L. Ed., 67.

II.

The City and County of San Francisco had no power to grant an exclusive railway franchise.

The fountain of power in the matter of granting franchises conferring special privileges of the kind under consideration in this case is in the State itself. This power may be delegated to municipalities, but the scope of their authority is always limited by the extent of the power granted. A city has no power to grant exclusive franchises unless specifically authorized to do so by the legislature of the State. Detroit Citizens Street R. Co. *vs.* Detroit Rwy., 171 U. S., 48, 43 Law Ed., 67; Owensboro *vs.* Cumberland Tel., Etc., 230 U. S., 58; Wright *vs.* Nagle, 101 U. S., 791; Jackson County Horse Rd. Co. *vs.* Interstate Rapid Transfer Ry. Co., 24 Fed., 306; Home Tel. and Tel. Co. *vs.* Los Angeles, 211 U. S., 264, 53 Law Ed., 176; Dillon Mun. Corp., 5 Ed., Sections 1215, 1218, 1234.

III.

Municipal competition, unless the municipality is expressly excluded from such competition, does not impair

the obligations of a contract arising out of a franchise to a public service corporation, though the holder of such franchise is protected against competition from other public service corporations.

Knoxville Water Co. *vs.* Knoxville, 200 U. S. 22, 50 L. Ed., 335; Madera Water Works *vs.* Madera, 228 U. S., 454; same case in District Court, 185 Fed., 281; Hamilton Gas Light Co. *vs.* Hamilton, 146 U. S., 268; 36 L. Ed., 963; Helena Water Works *vs.* Helena, 195 U. S., 383, 49 L. Ed., 245; Joplin *vs.* Light Co., 191 U. S., 150, 48 L. Ed., 127; Skaneateles Water Co. *vs.* Skaneateles, 184 U. S., 354, 46 L. Ed., 585; Bienville Water Co. *vs.* Mobile, 175 U. S., 109; 44 L. Ed., 93; Long Island Water Co. *vs.* Brooklyn, 166 U. S., 685, 41 L. Ed., 1165; Tillamook Water Co. *vs.* Tillamook, 150 Fed., 119; Lehigh Water Co. *vs.* Easton, 121 U. S., 388, 30 L. Ed., 1059; Seattle Electric Co. *vs.* Seattle, etc., R. R. Co., 185 Fed., 371; Puget Sound Traction Co. *vs.* Tacoma, 217 Fed., 265; Washington-Oregon Corp. *vs.* Chehalis, 202 Fed., 591; Clark *vs.* City of Los Angeles, 160 Cal., 30; Glenwood Springs *vs.* Glenwood L. & W. Co., 202 Fed., 678, L. R. A. (1915 C) 438 and note; Mayor, etc., *vs.* Farmers' L. & T. Co., 143 Fed., 71; San Francisco *vs.* McGovern, 28 Cal. App., 511.

IV.

Section 499 of the Civil Code limits the power to *grant* franchises conferred upon municipalities by Sec. 497. The power to *grant* franchises may be further limited or enlarged at the will of the legislature to meet the changing needs of the city's growth and development. Williams *vs.* Wingo, 177 U. S., 601.

V.

Section 499 is a regulatory statute enacted in the interest of the public generally and was not intended to con-

fer exclusive privileges upon grantees of street railway franchises.

> "The main purpose of the section is to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for more than five blocks." San Jose-Los Gatos Interurban Ry. Co. *vs.* San Jose Ry. Co., 156 Fed., 455.

VI.

It is elementary that the power of the State to amend laws regulatory in their purpose is not exhausted because once exercised.

VII.

The police power of the State may be exercised in the interest of public welfare and convenience as well as in the interest of public health, morals and safety.

Noble State Bank *vs.* Haskell, 219 U. S., 110, 58 L. Ed., 116; Camfield *vs.* U. S., 167 U. S., 524, 42 L. Ed., 262; German Alliance Ins. Co. *vs.* Lewis, 233 U. S., 389, 58 L. Ed., 1011; Rail & River Coal Co. *vs.* Yaple, 214 Fed., 273; Manigault *vs.* Springs, 199 U. S., 473; Chicago, Burlington and Quincy Ry. Co. *vs.* Nebraska, 170 U. S., page 57.

VIII.

Section 497 conferred power upon the municipality to grant franchises, but not exclusive franchises. Section 499 is not a grant of any further power to municipalities and it does not by its terms confer any franchise. Therefore, it cannot be said that by the provisions of this section a different kind of a franchise is granted to complainant than authorized by the provisions of section 497.

A municipality does not grant to itself the right, or confer a franchise upon itself, to operate a public utility. The operation of a public utility by a municipality is not the

exercise of a franchise. The term "railroad corporations" as used in section 499 does not embrace a municipality operating a municipally owned railroad.

IX.

The use of a street for street railway purposes is uniformly held to be an ordinary use of the street. If a first railway franchise granted was not exclusive, a second franchise granted for the same purpose is legitimate and imposes no different character of burden on the street, even though it may cause some inconvenience to others entitled also to use the street. All traffic upon the streets must submit to the inconveniences which necessarily flow from multiplied legitimate traffic.

X.

It is the general rule of law that lines of one street railway may cross the lines of another without compensation first paid.

Consolidated Traction vs. South Orange, etc., Co., 56 *New Jersey Eq.*, 569; *Nelles on Street Railways, vol.* 1, *sec.* 108; *Am. and Eng. Ency.*, 2*d vol.*, 27, *page* 24; *Lewis on Eminent Domain, vol.* 2 (3d ed.), *sec.* 424.

XI.

Section 500 of the Civil Code incorporates only such part of section 469 of title 3 as relates to the manner of crossing, viz:

> "The rails of either of such roads must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."

Section 510 of the same Code does not incorporate section 469 into title 4 of that Code.

XII.

The determination of the necessity for added transportation facilities on Market street rested with the proper municipal officers of the City and County of San Francisco, and is not a matter for review by the court.

XIII.

The complainant's franchise, not being exclusive, was taken subject to the right of the municipality to grant a second franchise, or the exercise by the municipality of similar rights without the necessity of a grant. The reasonable and necessary incidents flowing from the exercise of such second right were assumed by the grantee of the first non-exclusive franchise to the same extent as though the contract or ordinance granting the first franchise contained a specific recital that the grantee accepted the franchise subject to all the reasonable and necessary incidents flowing from the operation of the second street railway line. Therefore, the complainant cannot maintain its claim that its property right is damaged by the proper operation of a second road.

XIV.

The provisions of the San Francisco Charter as to solicitation of offers have been complied with.

A similar contention to the one made by complainant here was decided adversely in

Platt *vs.* City & County of San Francisco, 158 Cal., 74.

ARGUMENT.

It was necessary for counsel for respondents to commence the preparation of this brief before the receipt of copies of appellant's brief. We shall assume that counsel for appellant rely upon the same points urged before the trial court.

There are two important principles, enunciated by numerous decisions of the courts of this country, which are of controlling importance throughout the consideration of every aspect of this case, viz:

First. Grants of special privileges are construed strictly in favor of the public. "Whatever is not unequivocally granted is withheld; nothing passes by implication."

Second. The fountain of power, in the granting of franchises such as we are concerned with in this case, is in the State, and a municipality cannot grant any franchises other than such as the legislature has specifically authorized the municipality to grant. A city cannot grant an exclusive franchise unless the State has given such city power to grant exclusive franchises.

The State vested the city with authority to grant street railway franchises generally, subject, however, to the limitations contained in section 499 of the Civil Code. No authority was given the city to grant exclusive franchises. The State could have vested the city with power to grant exclusive franchises, or might have given power to grant such franchises generally without any limitation such as is contained in section 499, or the State might have added other limitations. The State did not exhaust its power relative to vesting the city with authority in the matter of granting such franchises at the time of the enactment of sections 497 and 499.

Any limitations or restrictions imposed upon the city may be removed at any time and further power given in the matter of granting franchises.

The franchise was accepted by the company subject to the imposition of further terms, conditions, and restrictions to meet the future traffic conditions. Section 2 of complainant's franchise reads as follows:

> "Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by

said company, upon such terms, conditions and restrictions as are now imposed, *or may hereafter be imposed*, by the laws of the State of California, and especially the terms, conditions, and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said company with all of the provisions of said laws is hereby required."

The City is Not Precluded from Operating Its Own Street Railways Because of the Terms of Section 5 of Complainant's Franchise.

Section 5 reads as follows:

> "Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this State. This section shall apply *to persons and companies, as well as corporations.*"

The city requires no grant of a franchise in order to enable it to construct and operate a municipal railway system. The sovereign power of the State, so far as the regulation and control of the use of the streets for any and every purpose, is now vested in the city. (Charter of San Francisco, Article II, Chapter I, Section I, Paragraph 2, pertaining to "Powers of the Supervisors.")

> "Except as otherwise provided in this Charter, or in the Constitution of the State of California, to regulate and control for any and every purpose the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County."

Section 19 of Article XI of the Constitution of California was amended October 10, 1911, and now, in part, reads as follows:

> "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water power, heat, transportation, telephone service, or other means of communication. Such works may be acquired by original construction or by the purchase of existing works including their franchises or both."

Neither the Words "Railroad Corporations" nor the Words "Persons and Companies as Well as Corporations" as Used in Section 499 of the Civil Code or in Section 5 of the Franchise Include Municipalities Within Their Terms.

The proposition stated above has been definitely decided by the Supreme Court and other Federal courts in the cases cited in our points and authorities, *supra*, from which quotations are here inserted.

Knoxville Water Co. *vs.* Knoxville, 200 U. S., 22; 50 L. Ed., 356.

In the above case the city granted a franchise to a water company providing:

> "In consideration of the promises and undertakings by the water company, as set out in the above agreement, the city covenanted and agreed, among other things, 'not to grant to any other person or corporation, any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, A. D. 1883, provided the company comply with the requirements and obligations imposed and

assumed by them under and by virtue of this agreement';"

The court say:

"The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed, of constructing its own system of waterworks. And it may be that it did not, in 1882, intend or expect ever again to think favorably of such a scheme. It may also be that the water company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the water company, it refrained from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the water company should be exclusive as against all other persons or corporations. We are therefore constrained by the words of the agreement to hold that the city did not assume, by any contract protected by the Constitution of the United States, to restrict its right to have a system of waterworks, independent altogether of the system established and maintained by the water company. If this interpretation of the contract will bring hardship and loss to the water company, and to those having an interest in its property and bonds, the result (omitting now any consideration of the ques-

tion of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do.

"While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying gas for a city and its inhabitants: 'It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently it contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis vs. Whitney*, 13 Wall., 68, 70; 20 L. Ed., 513, 514: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

Hamilton Gaslight & Coke Co. vs. Hamilton, 146 U. S., 258, 268; 36 L. Ed., 963, 968; 13 Sup. Ct. Rep., 90; *Skaneateles Waterworks Co. vs. Skaneateles*, 184 U. S., 354, 363; 46 L. Ed., 585, 590; 22 Sup. Ct. Rept., 400.

* * * * * * *

> "It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its power.
>
> "As, then, the City of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case."

Lehigh Water Co. vs. Easton, 121 U. S., 388-390; 30 L. Ed., 1059-1060:

The Lehigh Water Company for many years prior to June 21, 1880, maintained a system of waterworks in the borough of Easton. On that day it accepted the provisions of an act of the General Assembly of Pennsylvania approved April 20, 1974, entitled "An act to provide for the incorporation and regulation of certain corporations." By such acceptance it became entitled to the benefit of the third clause of the 34th section of that act relating to water and gas companies. That clause provides in part:

> "The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders during five years, a dividend equal to eight per centum per annum upon its capital stock;"

After the acceptance by the Lehigh Water Company of the provisions of the act referred to, the constituted authorities of the borough of Easton, in conformity with a vote of its qualified electors, and under power conferred by acts of the General Assembly approved March 12, 1869, and April 15,

1867, determined to construct and itself maintain a system of public works for supplying its inhabitants with water. The court held that the act of 1874 did not repeal the act of 1867, and that the exclusive nature of the franchise as applied to other private corporations does not extend to the municipality. Upon this point the court says (p. 1060):

> "The third ground of objection is wholly without merit. By constructing water works of its own the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded itself from such new grant the incidental injury can constitute no obstacle. *Charles River vs. Warren Bridge,* 36 U. S., 11 Pet. 420 (9:773); *Turnpike Co. vs. Maryland,* 70 U. S., 3 Wall, 210 (18:180); *Piscataqua Bridge vs. New Hampshire Bridge,* 7 N. H. 35. No contract has been shown between the water company and the State by which the latter is precluded from granting to the borough of Easton the privilege of erecting works to supply its citizens with water."

Washington-Oregon Corp. et al vs. City of Chehalis et al., 202 Fed., 591:

The city of Chehalis granted a franchise to a water company, in which it was particularly provided that the franchise should continue in force for a period of thirty years, "during which time the city of Chehalis agrees not to contract with any other person or persons, corporation or corporations, for a supply of water."

It was held that this language did not prevent the city from constructing a water system of its own during the thirty years' term of its franchise.

The cases on both sides of the question on the exclusiveness of a franchise of this character as against municipal

competition are cited on pages 594-595. After such citation the opinion continues:

> "As in any other contract, the language of the franchise must be looked to for the intention of the parties. In the Walla Walla case, the franchise was for 25 years, and provided that, until it was avoided by the court of competent jurisdiction, the city could not erect, maintain, or become interested in other water works. Held, in the absence of such a judgment, the city could not take steps to provide a water system of its own. In the Knoxville case, by the franchise, the city agreed 'not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville * * * for the full period of 30 years.' Held, that the city was not, in the absence of a special stipulation to that effect, precluded from establishing its own system of waterworks. In the Vicksburg case, the exclusive right and privilege was granted for a period of 30 years to erect, maintain, and operate a system of waterworks. Held, that the franchise precluded the city from erecting its own waterworks during the life of the franchise. While so holding, the Court reiterated that grants and franchises, are to be strictly construed in favor of the public, and that nothing is to be taken by implication. The Knoxville case is distinguished.
>
> "As shown above, in the case now under consideration, the language of the franchise, which it is contended is exclusive, is that:
>
> " 'The city of Chehalis * * * hereby agrees that this ordinance and franchise and the rights contained and granted thereby * * * shall continue in full force for a period of 30 years, * * * during which time the city of Chehalis agrees not to contract with any other person, or persons, corporation or corporattions, for a supply of water.'
>
> "In the light of the foregoing authorities, without citing others, the court holds that the City of Chehalis has not, by the franchise in question, precluded itself from erecting a water system."

Pudget Sound Traction, L. & P. Co. vs. City of Tacoma, 217 Fed. 265:

An ordinance granting a franchise to an electrical company provided that the city should have the right at any time to require the company to place its wires underground, but that it should not be required except on the same streets and to the same extent as the wires "of all other persons or corporations used to transmit electricity," were required to be placed underground.

Held, that the word "corporations" as used in said provision did not include the city, and the fact that the city itself maintained wires above ground did not invalidate an ordinance requiring the company to place its wires underground.

The decision is upon the ground that the city does not come within the designation of all other persons or corporations, thus following the Knoxville case. Upon this point, the court says:

> "Complainant's franchise provides that the city should have the right at any time to require it to place all or any portion of its wires in underground conduits, except the main transmission lines, from where the same enter the corporate limits from the generating plants to the main distributing stations, but that it should not be required to place the poles and wires underground except upon the same street or alley, or streets and alleys and to the same extent as the wires of all other persons or corporations used to transmit electricity for power and heat are required to be placed underground.
>
> "It is contended by complainant that the city is a corporation; that it has not, and does not intend to, put its heat and power wires underground; that to require complainant so to do is contrary to the foregoing provision of its franchise.
>
> "In view of the conclusion reached, that the underground ordinance does not apply to the purchased poles and wires, it is not necessary to decide this question; but, in view of the earnestness with which

it has been argued, it is deemed not improper to express the court's view.

"Throughout the ordinance granting complainant's franchise the city is always spoken of as 'the city' or the 'City of Tacoma.' This fact and the fact that, as ordinarily used and understood, the word 'corporation' does not include cities, while they are, in fact, municipal corporations, rendered it clear that the words 'persons or corporations' were not intended to include the city itself.

"In Knoxville Water Co. *vs.* Knoxville, 200 U. S. 22; 26 Sup. Ct., 224; 50 L. Ed., 353, by the franchise there in controversy the city agreed 'not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville * * * for the full period of 30 years.' It was held that the city was not, in the absence of special stipulations to that effect, precluded from establishing its own system of waterworks. The Knoxville case was followed by this court in Washington-Oregon Corporation *vs.* Chehalis (D. C.), 202 Fed., 591. The reasoning in the Knoxville case cannot be distinguished from that controlling in the present case."

Madera Water Works *vs.* Madera, 228 U. S., 454; 57 L. Ed., 915.

Tillamook Water Co. *vs.* Tillamook, 139 Fed., 406. Same case on appeal, 150 Fed., 119.

The opinions in the above cases last cited announce the rule here contended for, and are quoted from under another paragraph of this argument.

The City Was Not Vested with Power to Grant Exclusive Franchises, and Therefore Could Not Make the Grant Exclusive against Itself or against Persons, Companies, or Corporations.

Conceding for the moment, for the purpose of argument only, that the municipal corporation is included within the term "corporation" in that portion of section 5 reading as follows: "This section shall apply to persons and com-

panies, as well as corporations," we still contend that the city is not excluded from the operation of its municipal cars on any street in the city.

The authority for the municipality to grant street railway franchises is contained in section 497 of the Civil Code. It is by virtue of this section alone that the city was authorized by the legislature to grant to complainant the franchise in question.

Section 497 at the time the franchise was granted read as follows:

> "Section 497. Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the Trustees, Council or other body to whom is entrusted the government of the city or town under such restrictions and limitations and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks other than by horses or mules, unless for special reasons, as hereinafter provided."

Here is the city's authority to *grant* merely, with no power given it to make such grant exclusive.

It is a well-established principle of law, supported by innumerable decisions of the courts of this country, that a municipality has no power to grant exclusive franchises unless such power has been granted the municipality by the legislature. We will refer to only a few of the cases announcing this principle:

Detroit Citizens' Street R. Co. vs. Detroit Rwy., 171 U. S., 48; 43 Law Ed., 67:

In the case just cited the city had attempted to grant an exclusive franchise for the operation of street railways, and the question in the case was whether or not the city was prevented, because of the franchise formerly granted, from granting a similar franchise to another railway company.

The opinion was delivered by Mr. Justice McKenna, and, in part, reads, page 53:

> "That such power must be given in language explicit and expressed, or necessarily to be implied, from other powers, is now firmly fixed. There were many reasons which urged this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which without the clearest intention expressly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and reason for it are expressed in Mintuin *vs.* Larue, 64 U. S., 23; Wright *vs.* Nagle, 101 U. S., 791 (25: 921), and many other cases."

Again on page 55:

> "Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monoply. Consequently, those given in perpetuity and in monopoly must have for their authority exclusive permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensible."

In Vol. XII, R. C. L., page 188, the principle of law is stated as follows:

> "The power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensible to them. This principle is firmly fixed by authority" citing Water, etc., *vs.* Hutchinson, 207 U. S., 385; 52 Law Ed., 257; Owensboro *vs.* Cumberland Tel., etc., 230 U. S., 58, 69; 67 Law Ed., 1389; Wright *vs.* Nagle, 101 U. S.; Dillon Mun. Corp., 5th Ed., Secs. 1215, 1218, 1234.

The decision in the case of Jackson County Horse Rd. Co. *vs.* Interstate Rapid Transit Ry. Co., 24 Fed., 306, dis-

cusses the question of the power of a city to grant exclusive franchises very thoroughly.

In this case the city of Kansas had passed an ordinance granting to a railway company "the sole right for the space of twenty-one years [illegible] maintain, and operate their railway over [illegible] he streets in the city of Kansas." It was held [illegible] this ordinance as purported to give exclusive [illegible] as beyond the powers vested in the city of Kans[illegible] or that reason, void, and that the city could grant a franch[illegible] to another and competing company.

In the Home Tel. and Tel. Co. *vs.* Los Angeles, 211 U. S., 264; 53 Law Ed., 176, the court says:

> "The surrender by contract, or a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, *as well as the authority to make it* must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by the decisions in this court which will be referred to hereafter and we need not delay further upon this subject."

Judge Hunt, the learned trial judge in the court below, in speaking of the exclusiveness of the franchise in question, said (opinion of the court, Transcript, page 189):

> "This general rule is but another form of stating a principle that statutory grants by way of franchise or property, in which the Government or public has an interest are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.
>
> "It is very important to note that words of direct expression or intention to grant an exclusive franchise are not to be found in the instrument itself; nor

> does it appear that exclusiveness was a positive consideration for the contractual obligation. Nor is there any expression by apt words to show that the city intended to exclude itself from exercising the privilege of establishing a street railway of its own.

If the city had no power to grant an exclusive franchise directly, it could only accomplish the same result by refusing to make a similar grant to any other person or corporation. Such a refusal to grant a similar franchise to another street railway company might be a proper exercise of discretion by the board of supervisors, for section 497 states "Authority to lay railroad tracks * * * *may* be obtained for a term of years not exceeding fifty, etc." This would be the only way the municipality could maintain the exclusiveness of such a franchise already granted by it. This lack of authorization by the legislature to grant exclusive franchises for street railway purposes would render void any provision in such a franchise granted attempting to exclude either third parties or the municipality itself.

We do not interpret section 5 of the franchise as attempting to make the franchise exclusive even as against third parties. Section 499 provided at that time that "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track." We think this portion of section 499 furnishes the explanation for the insertion of section 5 in the franchise. The clause quoted is permissive only, and when such permission has been granted, each of the corporations is to pay an equal portion for the construction of the track. As a guard against any possible interpretation that the franchise granted was exclusive, or exempted the grantee from permitting a second corporation to use its tracks upon the payment of an equal portion of the cost of constructing such tracks, this provision of the law was incorporated in the way it is set out in section 5.

> "It shall be *lawful* for the Board of Supervisors of the City and County of San Francisco to grant to one

other corporation and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this State. This section shall apply to persons and companies as well as corporations."

This is a mere declaration that the city did not waive its right to grant to a second corporation the use of the streets for similar purposes to the extent and subject to the conditions set out in section 499. It is not the grant of any additional right to the company. The city could not exceed the power conferred upon it by the legislature in the matter of granting franchises. Section 5 of the franchise dealing with the same subject matter contained in section 499 of the Civil Code could not confer any right not authorized by section 499.

The City is Not Excluded from the Use of the Streets for Railway Purposes by Section 499 of the Civil Code.

Section 499 is found in the chapter dealing with street railroad corporations.

Section 497 of that chapter is the section of the Code conferring upon municipalities the right to authorize railroad tracks to be laid upon the public streets and highways of any incorporated city or town. Section 499 is a regulatory statute containing a limitation upon this power in the interest of the public use of the streets, and providing the manner in which two railway corporations may be permitted to use the same street or tracks. When complainant's franchise was granted the section read:

"Section 499. Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case *must* two railroad corporations occupy and use the same track for a distance of more than five blocks."

It is clear the legislature, in enacting the section as above quoted, had in mind the regulation of the streets in the interest of the public and did not have in mind any purpose of granting exclusive rights to one or more corporations in the interests of such corporations. The question of the inconvenience to the public which might arise if two railway corporations used the same street or tracks for a distance of more than five blocks was undoubtedly the predominating thought in the minds of the legislators. Inconvenience to the public might arise from obstructing the use of the street for other forms of traffic. They might have considered, having in mind the then existing forms of vehicular traffic, that inconvenience to other forms of street traffic would outweigh any benefits flowing from added street railway lines.

The legislature then considered it best to provide that two corporations might be permitted to use the same street or track for a distance of not more than five blocks, and made provision that in doing so each corporation should pay an equal portion for the construction of the track jointly used.

The latter clause of the section, as it stood at the time complainant's franchise was granted, prohibited two railroad companies from using the same street or track for a distance of more than five blocks in any event. Two corporations could not then jointly use the same street for a distance of more than five blocks even by agreement.

On March 21, 1907, section 499, was amended in part to read as follows:

> "Two or more lines of street railway operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such lease or contract upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly."

In 1911 the section was again amended in part as follows:

> "Provided, that any incorporated city, city and county or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits *for any number of blocks* upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway."

The amendments to the section reflect the changing views of the legislature relative to the regulation of street railway traffic in the interest of the public. Improvements in street railway construction, in the motive power used for propelling the cars, changes in the type and character of vehicular traffic, the rapid growth of large cities and the necessity of furnishing more adequate transportation, and many other considerations all tending toward the public interest moved the legislature in amending the section as set out above. At no period of this legislation does it appear that the legislature had in mind the granting of exclusive rights to any particular corporation engaged in street railway business.

Further light is thrown on the purpose of the legislature in adding the second clause of section 499 by the amendments to the corresponding statute made March 28, 1870 (Statutes 1869-70, p. 481) and March 23, 1872 (Statutes 1871-2, p. 515). After the amendment of March 28, 1870, the last clause read:

> "but no such *grant* shall be made for more than five blocks in all."

After the amendment of March 23, 1872, this clause read:

> "but no such joint *grant* shall be made *in the city and county of San Francisco* for more than two blocks in all."

What was the purpose of this amendment? Can it be said it was for the purpose of making street railway franchises relatively more valuable in San Francisco than in any other city of the State of California? It would be vicious legislation if this interpretation could be placed on the amendment of March 23, 1872. Such was not its purpose. The purpose was a further exercise of the police power of the State in the interest of the public of San Francisco generally to meet conditions as the members of the legislature then saw them to exist in this city. San Francisco was the largest city in the State. Market street, particularly, was the one great artery for traffic in the city. The legislature may well then have considered that the proper use of the street in the interests of all of the people, considering all forms of traffic, would best be subserved by a further limitation of the power of the board of supervisors to grant a joint use of the street or track for a distance of more than two blocks.

If this section was intended as a regulatory statute in the interest of the public convenience, it was at all times subject to amendment to best conserve public convenience. It was an exercise of the police power of the State.

The Circuit Court of the United States for the Northern District of California, in the case of San Jose-Los Gatos Interurban Ry. Co. *vs.* San Jose Ry. Co., reported in 156 Fed. Rep., p. 455, had before it a case involving the interpretation of section 499 of the Civil Code. Relative to the meaning of the section the court say (p. 458):

> "The main purpose of the section is to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for a distance of more than five consecutive blocks, and, as the city or town is authorized to grant to two independent railways the right to use the same street to the extent named,

provision is made for an equitable distribution of the cost of constructing such tracks and appurtenances, as are used by them jointly."

The construction placed upon the section in the case just cited is entirely reasonable. If that construction be correct, then the section could undoubtedly be amended by the legislature at any time in order to make the provisions of the section best comply with changing conditions of municipal needs and convenience.

Judge Hunt placed the proper interpretation upon the language of section 499, when he said (opinion of the court, transcript, p. 190):

> "* * * I believe that the section should be read as a whole and is not to be separated into two wholly independent provisions whereby the one is to be read as appertaining only to permission and the other as solely writing a prohibition to be regarded as a general law of the State binding upon municipal or other corporations, and not open to repeal or modification as affecting the franchise of complainant. The interpretation I put upon the last clause of section 499 is that in no case must two railroad corporations, granted permission under the section, occupy and use the same street or track for a distance of more than five blocks. Permission is indispensable. There may be permission for joint use but such use shall not be authorized for more than five blocks. That this was the construction put upon the provision by those directly interested at the time of the grant of the franchise is a fair inference when we consider the language of section 5 of the franchise, which provides in effect, that the supervisors may grant to one other corporation and no more, the right to use either of the streets described in the franchise, for a distance of five blocks and no more 'upon the terms and conditions specified in the 499th section of the Civil Code of this State.'"

Police Power of the State May Be Exercised in the Interest of Public Welfare, Convenience, and Necessity, as Well as in the Interest of Public Health, Morals, and Safety.

Complainant argued before the trial court that the police power of the State is properly limited to matters affecting the public health, morals and safety. This argument overlooks the fact that the police power may be exercised for the protection or promotion of the public welfare and convenience as well as for matters which come strictly within the category of health, morals, and safety. Decisions can undoubtedly be found in which the discussion as to the application of this power is limited, as claimed by complainant in the court below, but it cannot be successfully denied that recent decisions have extended this beneficent power to include the promotion of the public interest and convenience in many matters not strictly of health, morals, and safety.

Decisions of State courts might be cited almost without limit in which the judges of those courts have used very broad language showing the comprehensiveness of this power.

We content ourselves, however, with reference to a few of the recent decisions of the United States Supreme Court upon this question as follows:

Noble State Bank vs. Haskell, 219 U. S., 110; 55 L. Ed., 116:

In the above case the court upheld the validity of an act of the legislature of the State of Oklahoma providing for the collection of an assessment upon the average daily deposits of all banks within the State for the purpose of creating a depositor's guarantee fund out of which depositors in failing banks should be paid the amount of their deposits. With reference to such a law, the court say:

> "In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which

it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read the latter *a nolumus mutare* as against the lawmaking power."

* * * * * * *

"'*It may be said in a general way that the police power extends to all the great public needs.' Camfield vs. United States,* 167 U. S., 518; 42 L. Ed., 260; 17 Supt. Ct. Rep., 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In the case of Camfield *vs.* U. S., 167 U. S., 524; 42 L. Ed., 262, referred to in the Noble Bank case, the court say:

"The case is authority for the proposition that the police power is not subject to any definite limitations but is *coextensive with the necessities of the case and the safeguard of the public interest.*"

German Alliance Insurance Company vs. Lewis, 233 U. S., 389; 58 L. Ed., 1011:

In this case the court upheld the validity of an act of the State of Kansas regulating rates to be charged for fire insurance premiums upon the ground that the fire insurance business was so far affected with a public interest as to permit legislative regulation of its rates and charges.

Upon the question of the extent of the police power the court say (233 U. S., pp. 413-414; 58 L. Ed., 1022):

"Complainant feels the necessity of accounting for the regulatory State legislation and refers it to the

> exertion of the police power; but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to 'pass laws whose purpose is the health, safety, morals, and the general welfare of the people.' The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' *Chicago, B. & Q. R. Co. vs. McQuire*, 219 U. S., 540, 569; 55 L. Ed., 328, 339; 31 Sup. Ct. Rep., 259."

Reference might also be made to the recent case of Rail and River Coal Company *vs.* Yaple, 214 Fed., 273.

The decision in this case was rendered by three judges sitting in bank in the District Court of the Northern District of Ohio, and upholds an act of the State of Ohio, regulating the relations between employers and employees, and seeking to remove the causes giving rise to disputes between labor and capital. The decision (p. 280) contains a lengthy citation of cases in which the police power has been extended to matters of like character.

> "The powers by which the health, good order, peace, and general welfare of the community are promoted." Webber *vs.* Virginia, 103 U. S., 344; 26 Law Ed., 565.
>
> "One of the powers never surrendered by, and therefore remaining with, the State is to so regulate the relative rights and duties of all within its juris-

diction as to guard the public morals, safety, and health, as well as to promote the public convenience and the common good." House *vs.* Mayes, etc., 219 U. S., 270.

"While the police power has been most frequently exercised with respect to matters which concern the public health, safety, and morals, we have frequently held that corporations engaged in the public service are subject to legislative control so far as it becomes necessary for the protection of the public interest." *Louisville and Nashville Rd. vs. Kentucky*, 161 U. S., 695.

The exercise of the police power of the State may properly be exercised where it affects existing contracts, if public interest requires such exercise. This right was confirmed in the following cases:

Manigault vs. Springs, 199 U. S., p. 473; *Chicago, Burlington and Quincy Railroad Co. vs. Nebraska (in relation) Omaha*, 170 U. S., p. 57:

In Manigault *vs.* Springs, *supra*, complainant, and the two defendants had entered into a contract for the removal of a dam constructed across Kinloch Creek after the expiration of a certain period of time. In accordance with this agreement the obstruction was removed. Several years afterward the general assembly of the State passed an act reciting the necessity of draining the lowlands on the Santee River, whereby their taxable value would be greatly enhanced. Authority was given the *defendants by name* to erect and maintain a dam across Kinloch Creek. Plaintiff contended the statute impaired the contract; that it was not a valid exercise of the police power; that the statute was not a measure intended for the public *safety, health* or *morals*. The court held, in part, as follows:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common

> weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be effected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

Again, on page 481:

> "It only remains to consider, in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the State. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the *health, lives,* and *morals* of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose."

In Chicago, Burlington and Pacific Railroad Company *vs.* Nebraska (*supra*) it appears that the city of Omaha had entered into a contract with the Union Pacific Railway Company, the lessor of the defendant company, providing for the construction of a viaduct on Eleventh street across the tracks of this company, and in this agreement it was provided that the companies should pay three-fifths of the original cost of construction and of the damages to abutting property owners, and the city to provide for the payment of the remaining two-fifths of such cost and damages. A short time before the viaduct was opened for public use, the legislature of the State of Nebraska enacted a statute providing that cities of the class of Omaha should have power to require railroad companies operating tracks upon or across a public street, "to erect, construct, reconstruct, complete and keep in repair, any viaduct or viaducts upon or

along such street or streets and over or under such track or tracks, etc."

Several years thereafter the council of the city of Omaha passed an ordinance directing and requiring the railroad company to repair the Eleventh street viaduct in accordance with the plans and specifications prepared by the city engineer.

The case came to the Supreme Court on a writ of error. The railroad company claimed that it had entered into a contract with the city, under which the viaduct was built, at the joint expense of the railroad companies and the city; and that the enforcement of the ordinance in question would violate the terms of this contract, contrary to the provisions of the Constitution of the United States.

Mr. Justice Shiras delivered the opinion of the court. In part it is as follows:

> "No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continue to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be effected or controlled by subsequent legislation?"
>
> "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matter and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply."

Under the rules established by the cases above referred to, and many others which might be cited, it is apparent that the whole question of the regulation of traffic upon the streets of San Francisco is a matter for legislative and not judicial control. Complainant contended in the court below that it cannot be claimed that municipal action looking to the increase of street cars on an already badly congested street, with the necessary effect of increased danger to travelers, is designed in the interest of public health, morals, or safety. The reply to that suggestion is that such increase of street cars is designed in the interest of public convenience and welfare and that the determination by proper legislative authority of such convenience and welfare is not subject to review by the courts.

The evidence in this record shows the necessity for the proposed action by the city with reference to increased traffic upon Market street, but even in the absence of such evidence, the court could not substitute its judgment for that of the legislative officers of the city as to such necessity, or lack of necessity. The facts which appear from the evidence are that the growth of the city is being retarded by lack of sufficient street railway transportation facilities; that in order to remedy this condition, the city is expending nearly $4,000,000.00 in the construction of a tunnel, and that further street car facilities upon Market street are essential for the proper use of such tunnel. It must be assumed that the legislative officers of the city have balanced against whatever inconvenience may be caused by an increased number of cars upon Market street, the benefits which will be derived from the operation of such cars, and, in the exercise of the discretion committed to the board of supervisors, that body has determined that the welfare and convenience of the city demand this improvement. Under no theory of limitations of police power can it be successfully claimed that the board of supervisors has so exceeded its legal authority in this matter as to authorize a court to set aside its judgment.

Complainant's Rights, if any, under Section 499 of the Civil Code are Measured by the Present Form of that Section and Not By Its Terms as They Existed in 1879 When Complainant's Franchise Was Granted.

The reliance of complainant upon the original form of this section, as constituting a part of its franchise contract, overlooks the well-established doctrine that it is not all laws existing at the time of the grant of a franchise or other contract which enter into and form a part of such contract, but only those which affect the rights and obligations of the contracting parties.

Matters of municipal regulation do not fall within this category. The rule is clearly announced in a New York case, in which a depositor in a bank unsuccessfully sought to maintain the position that laws regulating the conduct of banks, which were in existence at the time he made his deposit, constituted a part of his contract with the bank.

Greenspar vs. Oliver, 149 N. Y., Supp., 752:

> "It is true that the State may, if it will, within the limits prescribed by its organic law, enter into private contracts with its citizens by which the people and the Government are forever bound; but we are never to construe a general statute as embracing such a purpose, when it is obvious that it was designed only as an expression of the legislative will for the time being, in a matter of mere municipal regulation. When this is the object of the law, those who act upon the faith of its provisions do so with a reasonable assurance, indeed, that it will not be modified or repealed until such action shall be required, in the judgment of the legislature, by the general interests of the community; but with notice that it is subject to revocation by the State whenever the public exigencies may demand. Such a repeal involves no breach of obligation in the sense of the Federal Constitution; for the faith reposed is on the stability of a general law, and not on the efficacy of a legal con-

tract. *People vs. Roper Commissioners of Taxes*, 47 N. Y., 501, 503; *Rector, etc., of Christ Church, Philadelphia, vs. County of Philadelphia*, 24 How., 300; 16 L. Ed., 602."

It must be conceded that a franchise granted, or contract made, by a California municipality cannot create any obligation upon such municipality, nor confer any right on the other party thereto, in excess of the power of the municipality so to do.

Williams vs. Wingo, 177 U. S., page 601 (1900):

This case involved the question of whether a license given to a second company to erect a ferry within one-half mile of one already under operation across New River in Virginia was a violation of franchise granted to first company.

By the statutes of Virginia authority was given to the county courts of the several counties to license ferries. The act of the General Assembly, passed March 5, 1840, contained this provision:

> "That it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one-half mile, in a direct line, of any other ferry legally established over the same watercourse."

In 1880 the county court of Giles county gave to the plaintiff in error a license to maintain a ferry across New River. On March 5, 1894, the General Assembly of Virginia passed an act providing:

> "That it shall be lawful for the county court of Giles county to establish a ferry at a point on New River, in said county, at a point around Eggleston depot, on the New River," etc. * * * Said court in establishing said ferry shall be bound by sections thirteen hundred and seventy-five, thirteen hundred and seventy-six, thirteen hundred and seventy-seven

(and a number of others); but section thirteen hundred and eighty-six of said code, so far as the distance of one-half mile is concerned, shall not apply to the establishment of said ferry at said place."

Under this act a license was given to the defendant in error to establish a ferry within less than half a mile of the ferry established by the plaintiff in error under his prior license.

Mr. Justice Brewer delivered the opinion of the court, and stated, in part:

"The contention of the plaintiff in error is that under the laws of the State of Virginia in force at the time of such action, the license granted by the county court to him to establish a ferry created a contract between him and the State to the effect that no other ferry should be established within half a mile; and that the act of 1894 and the subsequent proceedings of the county court of Giles County impaired the obligation of that contract, and, therefore, were repugnant to section 10, Article 1 of the Constitution of the United States.

"This is an obvious error. The act of 1840 was one of general legislation, and subject to repeal by the General Assembly. No rights could be created under that statute beyond its terms, and by it no restraint was placed upon legislative action. When the General Assembly gave to the county courts power to license ferries it by that act in effect forbade them to establish a second ferry within half a mile of the one already established, but that bound only the county court. It did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute.

(Other cases were cited.)

"In the case at bar the only effect of the act of 1890, while in force, was, as we have said, to tie the hands of the county court. It operated in no manner

> as a restraint upon the legislature or as a contract upon its part that the State would not act whenever in its judgment it perceived the necessity for an additional ferry. The fact that in this case the special authority was given to the county court is immaterial. A general act forbidding county courts to license additional ferries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second."

The principle announced by the court in the above case has never been modified in any degree, so far as we have been able to discover.

The facts of the case before this court now and the case lastly referred to are identical in principle. The legislature of the State of California did not give to the city the power to grant exclusive franchises and the city did not purport to grant exclusive franchises. The legislature did give to the municipality the right to grant street railway franchises, subject to a limitation contained in section 499, which limitation was imposed to meet existing conditions as the legislature then saw them. The legislature vested the municipality with the power to grant certain street railway franchises. This did not mean that the same legislature could not at some future time vest the municipality with authority to grant other and additional franchises, or to modify or remove the limitations contained in section 499. The State is sovereign in the exercise of this power, and until it binds itself by granting exclusive franchises, or vesting municipalities with the power to grant such exclusive franchises, and under which vested power they have acted, the State has not exercised its final power in that regard.

Complainant does not question the rule that the police power is a continuing one. That rule has been so frequently announced and consistently adhered to that we will not burden this argument with authorities thereon, other than to quote from one of the recent cases in the Supreme Court, to wit:

Baltimore vs. Baltimore T. & G. Company, 166 U. S., 673; 41 L. Ed., 1160:

> "If it be said in this case that the City had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition today and to another and additional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously. *New Orleans Gaslight Co. vs. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S., 660-672 (20:516-524); *New York & N. E. R. Co. vs. Bristol*, 151 U. S., 556, 567 (38:259, 273)."

Grants of Franchises and Special Privileges are Construed Strictly and in Favor of the Public.

The proposition stated is true whether a franchise for the operation of a street railroad be granted by the legislature directly or by the city under authority of a State statute, or in either case where we are considering the applicability of a general law of the State.

Regardless of whether section 499, particularly the latter clause of the section, is a regulatory provision, enacted under the police power of the State, we contend that the present language of the section is controlling in this case, under the doctrine of construction stated above.

It should be borne in mind that section 499 refers to corporations which may be granted permission to use the streets. It is a limitation upon the power to grant, conferred by section 497. The municipality is not expressly included in the language of either section. The municipality needs no grant or special franchise to use its own streets. The city cannot be included by way of implication if we are to con-

strue a right or franchise granted most strictly against the donees and in favor of the public. The proposition announced above is so well established by the courts of the country that quotation from the decision is not necessary other than to show the applicability of some of the cases to this case.

Tillamook Water Co. vs. Tillamook City, 150 Fed. Rep., 119:

> "The plain and complete answer to the appellant's contention is that, by the contract upon which it relies, the city did not agree not to establish a water system of its own for the supplying of the city and its inhabitants with water. Not only is there no express agreement to that effect, but there is not a word or a syllable in the contract even tending in that direction: and, even if there was, the law is that a municipality cannot exclude itself from competition in such a matter by mere implication, for 'we are to remember', said the Supreme Court, in the very recent case of *Vicksburg Water Co.*, U. S. Supreme Advance Sheets, July 1, 1906, 26 Supt. Ct., 660 (202 U. S., 453; 50 L. Ed., 1102), 'the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and land cases, and we have no disposition to detract from its force and effect, and, unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of its contract, it cannot be held to have done so by mere implication.'"

The above language is from the decision of Judge Ross in the Court of Appeals.

The leading cases in the Supreme Court are cited by Judge Gilbert in his opinion in the Circuit Court in the same case, found in 139 Federal, at page 406, as follows:

> "The principles which must control the decision of the present case are to be found in *Charles River*

Bridge Co. vs. Warren Bridge Co., 11 Pet., 420; 9 L. Ed., 773, 938; *Long Island Water Supply Co. vs. Brooklyn,* 166 U. S., 685; 17 Sup. Ct., 718; 41 L. Ed., 1165; *Bienville Water Supply Co. vs. Mobile,* 175 U. S., 109; 20 Sup. Ct., 40; 44 L. Ed., 92; *Skaneateles Water Co. vs. Skaneateles,* 184 U. S., 354; 22 Sup. Ct., 400; 46 L. Ed., 585; *Joplin vs. Light Co.,* 191 U. S., 150, 24 Supt. Ct., 43, 48 L. Ed., 127, and *Helena Waterworks vs. Helena,* 195 U. S., 383; 25 Sup. Ct., 40; 49 L. Ed., 245. In the first of these cases the court declared the general doctrine, which has been followed in all the subsequent decisions, that public grants are to be construed strictly, and that in such grants nothing passes by implication. In the second case the court said: 'The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the street of the town, and contained a covenant on the part of the town to pay certain hydrant rentals; but *grants from the public are strictly construed in favor of the public,* and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege.' "

Helena Water Works vs. Helena, 195 U. S., 392; 49 L. Ed., 250.

"It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable, and perhaps unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract."

The cases are again reviewed and the rule again stated by Mr. Justice Harlan in Knoxville Water Company against Knoxville, 200 U. S., 33; 50 L. Ed., 359, as follows:

"Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public." Such were the words of this court in *St. Clair County Turnp. Co. vs. Illinois,* 95 U. S., 63; 24 L. Ed., 651, 652. The universal rule in doubtful cases—this court said in *Oregon R. & Nav. Co. vs. Oregonian R. Co.,* 130 U. S., 1, 26; 32 L.

Ed., 837, 842; 9 Sup. Ct. Rep., 408—is that "the construction shall be against the grantee, and in favor of the Government." As late as *Coosaw Min. Co. vs. South Carolina*, 144 U. S., 550, 562, 36 L. Ed., 537, 542; 2 Sup. Ct. Rep., 689, 691, this court said: 'The doctrine is firmly established that only * * * that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, "is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell vs. Grandjean*, 111 U. S., 412, 438; 28 L. Ed., 321, 330; 4 Sup. Ct. Rep., 475. We have never departed from or modified these principles, but have reaffirmed them in many cases.

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If, by contract or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

One of the latest expressions of the Supreme Court on this subject is found in *Madera Water Works vs. Madera*, 228 U. S., 454; 57 L. Ed., 915, where the court says:

"But if, when the plaintiff built, the constitution of the State authorized cities to build waterworks as well after works had been built there as before, the plaintiff took the risk of what might happen. An appeal to the 14th Amendment to protect property from a *congenital defect* must be vain. *Abilene Nat. Bank vs.*

Dolley, 228 U. S., 1, 5; *ante*, 707; 33 Sup. Ct. Rep., 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the constitution so as to avoid the result if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

"The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. *Hamilton Gas Light & Coke Co. vs. Hamilton*, 146 U. S., 258; 36 Law Ed., 963; 13 Supt. Ct. Rep., 90; *Joplin vs. Southwest Missouri Light Co.*, 191 U. S., 150, 156; 46 L. Ed., 127, 129; 24 Sup. Ct. Rep., 43; *Helena Waterworks Co. vs. Helena*, 195 U. S., 383, 388, 392; 49 L. Ed., 245, 248, 250; 25 Sup. Ct. Rep., 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it has given to the plaintiff was held not to preclude the city itself from building waterworks of its own. *Knoxville Water Co. vs. Knoxville*, 200 U. S., 22, 35; 50 L. Ed., 353; 26 Sup. Ct. Rep., 224. Compare *Vicksburg vs. Vicksburg Waterworks Co.*, 202 U. S., 453, 470; 50 L. Ed., 1102, 1111; 26 Sup. Ct. Rep., 660; 6 Ann. Cas., 253. As there is no contract, the plaintiff stands legally in the same position as if the constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show."

Other cases to the same effect are cited in our points and authorities *supra*.

The city and county of San Francisco is no more a railroad corporation than the city of Knoxville was a water corporation.

We repeat again, setting aside for the moment the interpretation of section 499 as a regulatory provision enacted

under the police power of the State—there is nothing in section 5 of the franchise showing an intention to exclude the municipality itself, and such a provision would be wholly unauthorized if it were found there; nor is there any express inclusion of the municipality in section 499 of the Civil Code, which complainant claims forms a part of its contract. The doctrine of strict construction applies just as much to the provisions of the general law of the State if it is to be considered a part of complainant's contract.

Crossing of Complainant's Tracks Not a Taking or Damaging of Property Without Due Process of Law, and Does Not Require that Compensation be First Paid.

The above proposition is true for the following reasons:

1. It is a general rule of law that the lines of one street railway may cross the lines of another without compensation.

2. Section 500 of the Civil Code is contained in Title 4 of that code dealing with street railways. The reference in section 500 to chapter II, title 3, relates only to the *manner of the crossing*, and not to the provision for compensation.

3. The provisions of section 469, title 3, providing for compensation for cutting and adjusting the rails and resorting to condemnation of the right of way, are not, by the provisions of section 510, made applicable to two street railways crossing each other.

I.

Rule as to Street Railroad Crossings.

It is undoubtedly the general rule, supported by reasoning which cannot be assailed, that one street railway company crossing the tracks of another street railway company is not

obliged to compensate the other company for the crossing. A case which forcibly states this doctrine is

> The Consolidated Traction *vs.* South Orange and Maplewood Traction Company, 56 New Jersey, Equity, 569.

For the reason that the principle is so unanswerably stated in the opinion of the court, we quote therefrom at length:

> "Considering the question, therefore, upon its merits, I shall apply the principles relating to it which seem to me to be settled by our decisions above referred to, especially in the *Hinchman Case*, the *Heasley Case*, the *Morris* and *Essex Railroad Case* and the *West Jersey Railroad Case, supra*. These cases settled that electric street railways, operated by the overhead trolley system with its poles and wires, are not additional burdens upon the soil of the highway, and that these structures may be placed in the public streets without compensation to the owner of the soil, subject to the public easement of passage, and other ordinary uses of a highway. They also settle that a steam railroad, lawfully constructed across a public street cannot exclude the public from the right to use the highway at the point of crossing, or from crossing their tracks by street cars operated by either horses or trolley, except to the extent that interference may be necessary to permit the lawful operation of the steam railroad at the point of crossing. These principles, as it seems to me, control the right of trolley companies, whose tracks are laid longitudinally in the public street, to prevent the crossing of their tracks. They can only prevent this crossing as far as the crossing interferes with or prevents the operation of their road or the exercises of their franchises. Their tracks occupy the streets, longitudinally, without compensation to the abutting owner, only upon the theory that they provide a method of passage over the street which does not interfere with the ordinary use of the streets for public travel, and that their construction or operation in their ordinary mode does not exclude or prevent reasonable crossing of its tracks by the public. And the right of the legislature or

of a municipality under the authority to provide for crossing of tracks already laid down by other tracks operated in the same manner, seems to rest upon the same foundation as the original right of the complainant to construct its own tracks in the public streets, and operate by overhead trolley, without compensation. The right of one street railway to cross another street railway already constructed, is the same legitimate use of the highway as the construction and operation of the original road, and the original right to operate and construct a road in the public streets is necessarily subject to all legitimate purposes of crossing. This would include the methods of crossing made necessary by the development of legitimate methods of using the streets for travel. Nor does the fact that the crossing, as at present proposed, necessitate some actual interference with the tracks and wires as constructed, and to some extent changes thereafter the exclusive use by complainant at the crossing, prevent the crossing by a similar railway company without compensation, if made under the proper legislative authority. For these changes are the necessary result of the development of the method of operating electric roads at their points of crossing, and are such as are made necessary as the best and safest methods now attainable for the safety and convenience of the public in the operation of both roads at the point of crossing. They are, therefore, changes and burdens in the use of its tracks and trolley system, to which the original right to lay and construct them was necessarily subject, and, in a legal point of view, are different only in degree, and not in character, from the changes in the property and control of its tracks made in the ordinary horse car crossing. By reason of the operation of both railroads by electricity supplied by overhead wires, the actual joint use at the point of crossing, which was, with the horse railways, confined to a short space on the tracks and surface of the ground, is now extended to a more complicated system of tracks on the surface, and also of wires overhead. But it is still, in the whole extent of the crossing appliances, and in every part thereof, merely a crossing in the safest and best manner by two street railroad companies, each of which has the right to use electricity at the place of

crossing, with the proper tracks and wire system for that purpose. The use of the whole system, although a complicated use, is still, in its essential nature, only a joint use of the public highway at the point of crossing for the *sole* purpose of crossing, and, inasmuch as the complainant's tracks and wires were originally laid and constructed subject to the right of the proper authorities to disturb them for the purpose of legitimate public travel in the public street across their tracks, and the changes and disturbances, are necessarily incident to such crossing, these are not, in my judgment, the subject of compensation. If the complainant is to be compensated for the changes in its property to which it is subjected, solely by the necessity of providing for legitimate public travel across its tracks, and can prevent such travel on the streets from crossing its tracks until compensation for the changes in its property and damages (whatever they may be) arising solely from the necessary provisions for such travel, then a situation arises in which it may be necessary to consider whether the structures which complainant has erected in the street have not now become such as interfere with and obstruct public travel at the point of crossing, and for such exclusive benefit of the complainant that they go beyond its rights of occupation of the street, and whether the company, on its part, has not become subject to claims for compensation based on the imposition of an additional burden on highways, at the point of crossing, for its exclusive use. The only basis for the existence or continuance of complainant's structures in the street, without compensation, is that they do not substantially interfere with the ordinary and proper use of the highway for public travel, and so long as the structures it erects are kept within its limits, no right to compensation would arise, but if the structures it now erects do interfere with legitimate public travel across its tracks, by methods of travel which are legitimate on the other portion of the public street, then, as it seems to me, the complainant has erected and is operating a system which is no longer a mere instrument for public travel over the highway, subject to the right of the public to cross it in any legitimate manner, but has, by its structures, interfered with and obstructed a cer-

tain portion of the legitimate travel across its tracks. And if these structures of complainant cannot be safely or reasonably crossed by such legitimate travel, without compensation, then the operation of them goes beyond the original limitation of complainant's right to occupy the streets for travel in common with the public, and as to the legitimate travel in crossing, complainant's structures are not entitled to be protected by injunction for the purpose of securing compensation.

"I reach the conclusion, therefore, on the merits of the question, that the complainant is not entitled to compensation for damages to its property by the proper construction of this crossing, and as the crossing, when properly erected, will not interfere with the exercise of its franchises, the application for preliminary injunction on this ground of right to compensation is refused.

"This conclusion agrees with the principles settled by the decisions of the courts of other states, in cases involving the right of crossing in public streets, so far as I have been referred to them. These are cases of street car tracks crossing steam railroads, and deny this right to compensation."

The rule so clearly announced by the above case is supported generally by the text writers who cite numerous cases in support of their text.

Nellis on Street Railways, Vol. 1, p. 254, sec. 108:

"The right of a railroad company to cross or occupy any part of the streets of a city constitutes a mere easement. It gives no title to the street itself. Therefore a street railway company operating under proper municipal authority may construct its lines across the tracks thereof without instituting condemnation proceedings or paying damages therefor unless the statute provides to the contrary. Where a city is vested with power to say whether or not a street railway shall be operated on any of its streets, and it authorizes the construction and operation of a street railway along a street which is a public highway, another street railway company whose tracks

such railway will cross cannot enjoin the construction over its rights of way by the company having the later franchise on the ground that such right can only be acquired by condemnation. To deny street railways the right to cross other railroads would be to confine their expansion and usefulness within narrow limits.

Where a railroad crosses a street along which a street railway company is authorized to construct its lines such company has an implied right to cross the tracks of such railroad as a means necessary to carry out the public purpose for which it was incorporated. So where a suit in equity was brought by a railroad company to enjoin the construction and operation of a street railway, upon a certain street, and crossing its tracks at grade, on the ground that such crossing would cause inconvenience to it in the operation of trains, and add to the dangers of the street crossing, it was held that these facts standing alone did not constitute a ground for injunction. The railroad whose tracks are crossed cannot complain because the street railroad company crossing is permitted to operate an electric line; it must submit to the inconveniences that may result from the growth and development of the city and the consequent increase of and change in the modes of travel."

Am. and Eng. Ency., 2nd Ed., vol. 27, p. 24:

"A franchise for the operation of a street railway on a public street does not confer any right of exclusive occupancy of the street nor clothe the owner thereof with power to prevent the crossing of its tracks by another company having a franchise to operate a railway on an intersecting street."

Lewis on Eminent Domain, vol. 2 (3d ed.), section 424, p. 768:

"Street railroads being held to be a proper street use, may cross railroads of all kinds laid across the street, without compensation. It is the duty of the street railroad to construct the crossing at its own expense, and the general rule is that if it is proceeding to do so in a proper manner it cannot be enjoined."

It must be assumed by the court that these crossings will be made in an improved and up to date manner. The character of such crossings are seen in the streets of every large city in the country. No street railroad system could be established without crossings. If complainant's contention is correct that the law of California is different from that announced in the case of Consolidated Traction *vs.* South Orange, etc., it is quite remarkable that the right to compensation has not been frequently asserted by street railway companies whose tracks have been crossed by the tracks of other street railway companies.

The only case in which the question of the right of one street railroad to cross the tracks of another street railroad ever arose in the Supreme Court of California is that of the Market Street Railway Co. *vs.* The Central Railway Company, 51 Cal., 583. In this case the doctrine is laid down *contra* to the position taken by counsel for complainant. Since the decision in the Supreme Court in the case just referred to, no case has arisen, as far as we are aware, in which the same question has been involved. The case therefore stands as the authority in that State upon the question, and it is amply supported in reasoning. We shall hereafter more fully discuss this decision.

II.

Construction of Section 500 of the Civil Code.

Complainant, of course, took its franchise subject to the provisions of that section. The *extent* of the easement, so far as crossings are concerned, is controlled by section 500. We have shown the general rule to be that a street railroad company is not entitled to compensation when the lines of another street railroad company crosses its tracks. The reason for this rule is obvious.

Crossings necessarily must be made. The right of a street railway company in the street is a right to use the street for

railroad purposes and maintain tracks therein for public convenience. It would be a strange rule which would allow a company to obtain a franchise to lay down tracks in a street for railroad purposes upon the theory that it is serving a public necessity, and that such a use does not unreasonably interfere with the ordinary and customary use of the street by the general public, but which would require another company acquiring identical rights to compensate the first company for crossing its tracks.

While the rule that "statutes in derogation of common law must be strictly construed" has been abrogated in California, it is nevertheless elementary law that statutes are never given a construction which leads to absurd results when such a construction can be avoided. This rule is liberally applied in favor of the public, as the cases we have theretofore cited show. It would be absurd to grant to a street railway corporation a right to maintain tracks in the street and to include in the grant the right to insist that every other street railway corporation obtaining the same rights must pursue condemnation actions before that company could cross the tracks of the *first* company.

Section 500 of the Civil Code reads as follows:

> "*Crossing tracks. — Obstructions.* — Any proposed railroad track may be permitted to cross any track already constructed, the *crossing* being made as provided in chapter two, title three, of this part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

Here, by direct law, complainant's predecessors in interest took the franchise subject to the right of any other company obtaining a franchise for a street railroad to cross the tracks of complainant's predecessors. So far as crossings are concerned, this is the *extent of complainant's easement.*

Section 500 refers to chapter II, title III, of the Civil Code dealing with railroad corporations generally as distinguished

from "street railroad corporations" which is the special subject dealt with in title IV in which section 500 is found.

Section 469 of that chapter and title reads as follows:

> "*Crossings and intersections, condemnation.*—Whenever the track of one railroad intersects or crosses the track of another railroad, whether the *same* be a street-railroad, wholly within the limits of a street or town, or other railroad, *the rails of either or each road must be so cut out and adjusted as to permit the passage of the cars on each road with as little obstruction as possible;* and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under title seven, part three, Code of Civil Procedure, and the damage assessed and the right of way granted as in other cases.

Section 469 specifically governs crossings of a steam railroad over the right of way of another steam railroad, and the crossing of the tracks of a street railroad by a steam railroad. The first half of the section provides how the *crossing shall be made.* The second half of the section provides for the compensattion that must be paid by the company crossing the tracks of another.

Section 500 does not incorporate in that section all of the provisions of chapter II, title III, and does not incorporate by reference any particular section of that chapter and title. It incorporates only so much of that chapter and title as provides how *crossings shall be made.* Therefore, we submit that only that portion of section 469 is incorporated which pertains to the method of crossings, namely, that "*the rails of each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible,*" and that the balance of the section has nothing to do with how the crossing shall be made. This is the reasonable and natural construction of section 500, and if

it had been intended to carry into section 500 the provisions of section 469 as to compensation, the matter could have easily been included therein by adding after the word *"crossing"* the words "and compensation" so that the section would then read "Any proposed railroad track may be permitted to cross any track already constructed, *the crossing and compensation* being made as provided in chapter two, title three, of this part."

The case of

> "Market Street Railroad Company (the predecessors in interest of complainant) *vs.* Central Railroad Company," 51 Cal., 584,

has been already referred to.

The Central Railroad Company's franchise was granted subsequent to the adoption of section 500 into the Code. The particular franchise to Market Street Railroad Company in question in that case had been granted prior to the insertion of this section in the Code. If the Central Railroad Company was granted the right under its franchise to cross the tracks of another company, it would be obliged to do so under the provisions of section 500 of the Civil Code, which was the law at the time its franchise was granted and also at the time it attempted to make the crossing and the action referred to was commenced. The exact question presented to the court was whether one street railroad company had the right to cross the tracks of another, and that was being done without condemnation. The attention of the court is directed to the brief of counsel for appellant found on page 585 (51 Cal.) in which the case of Appeal of N. B. & M. M. R. R., 32 Cal., 510, 511, 512, is cited and also to the fact that counsel there argued "one street railway cannot cross another save under express statute authority upon compensation made." The court, however, held in a short decision, that the right of the appellant Market Street Railroad Com-

pany to maintain its tracks in the street did not exclude the right of defendant to cross its tracks.

In the opinion the court said:

> "The maintenance of horse-railroads, and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street, nor does it prevent the crossing of its tracks by another railroad maintained for a similar purpose, provided the crossing is effected with as little damage as may be.
>
> "We see nothing in the circumstances here which required the interposition of a court of equity to enjoin the Central R. R. Co. from maintaining their road in the manner they appear to have pursued."

We have made the foregoing argument treating the city as occupying the same position as that of a private railroad corporation. This is not the position of the city, of course, as we have shown. But its position for the reasons hereinbefore advanced could not be less favorable.

Since writing the foregoing we have been furnished with copies of complainant's brief.

In rather summary fashion the complainant disposes of all questions in reference to crossings and the applicability of the latter part of section 469 to cases like that before us by referring to section 510 of the Civil Code of California. The assertion is rather dogmatically made that because the words "so far as they are applicable" are used in section 510, therefore, anything which may appear in the preceding sections in title 3 will be held to include street railways. Such a construction we think illogical, and the particular language employed in section 510 would negative complainant's argument. "Street railways are governed," would seem to indicate, in the choice of the verb, a particular intention upon the part of the legislature. Title 3 of the Code is divided into three chapters. Chapter 1 is entitled, "Offices and Corporate

Stock"; chapter 2, "Enumeration of Powers"; chapter 3, "Business, How Conducted."

Strictly speaking street railroads, signifying the physical thing itself, are not "governed." The corporation or person owning and operating the road is "governed," because government operates upon individuals and corporations, and not upon inanimate things.

Going through title 3 section by section, it will be observed that the whole of chapter 1 deals with railroad corporations generally. The subject-matter of the chapter is the management of the corporation, assessments of stock, borrowing of money, providing a sinking fund to pay bonds, fixing of capital stock, and certificate of payment of fixed capital stock. The term used in this chapter is "railroad corporations." Therefore, the whole of chapter 1 of title 3 is applicable to street railroad corporations.

Chapter 2, as already stated, enumerates the powers of railroad corporations. Without analyzing every section of that chapter, we believe the language in this chapter, with two exceptions, pertains to operation of steam railroads as distinguished from street railroads. The railroad corporations contemplated in the section are authorized to do various things, as for example, to cause examination and surveys to be made of their routes, to lay out the roads not exceeding ten rods wide, to construct the roads across and along streams, water courses, bays, etc. They are obliged by section 466 to file maps of their roads. They are authorized by section 467 to change their routes, and by section 468 their franchises may be forfeited unless the work is commenced and completed within stated periods. Section 469 is the section pertaining to crossings by roads, which section we will hereafter discuss. By section 470 they are not permitted to use the streets, alleys, or highways, or any land within a city without a two-thirds vote of the city authorities. By section 477, State land is granted to these corporations for the construction of their roads.

All of these sections, with the exception of section 473, unless the court gives to section 469 a construction which we do not believe that the section will sustain, clearly refer to and contemplate powers and obligations of steam railroads. Section 473 can be made applicable to street railroad corporations. That section provides at considerable length for the consolidations of two or more *railroad corporations,* and, as we say, this section can be made applicable, and is applicable, so far as its terms are concerned, to street railroads.

Chapter 3, as already stated, is entitled "Business, How Conducted." With the exception of section 494 of that chapter, a reading thereof clearly indicates that the whole of that chapter, with that exception, is dealing with the conduct of the business of a *steam road corporation.* For example, section 479 provides that checks must be affixed to every package or parcel when taken for transportation. Section 480 provides that an annual report must be made to the Secretary of State, of those things which are only within the business of a steam railroad corporation. Section 481 provides that it must run its cars for transportation of persons or property at such regular times as it shall fix by public notice. Section 482 provides that upon refusal to receive any passenger or property, damages may be recovered. Section 483 requires that accommodations must be furnished to every one to whom a ticket is sold, and section 484 that printed rules and regulations regarding fares and conduct of its passengers must be conspicuously posted, and that if any passenger is injured from the platform of a car, or any baggage, wood, gravel, or other car in violation of any of the printed regulations, the corporations is not responsible, unless the corporation failed to comply with the regulation that sufficient accommodations must be furnished the passenger, as provided in section 483. Section 485 provides that the corporation must maintain fences along railroads and fixes damages for killing of stock. Section 485-A provides that owners of the property through which a railroad

runs may have private right crossings under certain regulations and conditions.

Section 486 provides that a bell weighing at least twenty pounds must be rung at every crossing. We will not review the rest of the chapters, but they, too, pertain to matters as of the character of the foregoing.

Section 494 of chapter 3 is general in its terms, and is applicable to a street railroad corporation the same as any other railroad corporation. This section provides for the sale of the property and franchises of *one railroad to another railroad*. It goes into considerable length as to the procedure of such sale, and how such sale may be legally made. The particular object that we have in thus analyzing title 3 is to show that by reading title 3 section by section there are sections to be found in all three chapters of that title which are applicable to street railroad corporations as well as steam railroad corporations, and the language of each section itself clearly indicates that it is dealing with railroad corporations in general in some places and dealing with steam railroads specially in others. Now, of course, if we are to construe the language of section 510, "so far as they are applicable," to mean anything that can be made to apply, rather than to construe the section with appropriate regard of what was intended by the legislature in passing these various sections, and give our construction thereof a sound and reasonable one, many of these sections which, as already stated, would be impracticable in a sense in the operation of a street railroad, but nevertheless would be capable of execution. It would be possible for a street railroad to ring a bell weighing at least twenty pounds at every crossing and that every corporation must start and run its cars for the transportation of passengers at such regular times as shall be fixed by *public notice*, and on being tendered the fare therefor furnish to every person desiring a passage on the passenger car, a ticket, and other examples of the same character could be given. Those provisions of title 3 which are to be incorporated in title 4 are those sections which can be taken bodily from title 4 and

become a part of title 4 without substitution of terms as such terms were used in title 3. In other words, by way of example, it is apparent that section 490 refers solely to a steam railroad when it provides that every railroad corporation must provide and furnish a passenger a ticket upon being tendered the fare. But the provisions of chapter 1 of title 3 pertain, as the title specifically states, to railroad corporations in general and by their terms are capable of including street railroad corporation as well as any other corporation.

Coming to section 469, a reading of that section and an observation of its punctuations show that the subject-matter dealt with is the crossing of a track of a steam railroad over the track of another railroad, whether that other railroad be a street railroad wholly within the limits of a city or town, or any other railroad. In other words, the section as it stands cannot be construed as covering the crossing of a street railroad over a steam railroad or another street railroad. Observe the language and punctuation: "Whenever the track of one railroad intersects or crosses the track of another railroad, whether the same be a street railroad, wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible * * *." The provision, whether the same be a street railroad wholly within the limits of a city or town, clearly refers to the railroad whose tracks are crossed. Now, for this section to be taken over into title 4 the terms of the section would necessarily have to be changed so that the section would read,—"Whenever the tracks of one railroad whether the same be a street railroad or other railroad intersects or crosses the tracks of another railroad, whether the same be the tracks of a street railroad or other railroad, the rails of either or each road must be so cut, * * *."

The cases cited by counsel for defendant, on pages 84 to 90, upon the point now being discussed, are all cases, with the exception of two, of one steam railroad crossing the

tracks of another. As to the rule that in such cases compensation must be made for the crossing, we are not here concerned nor are we disposed to quarrel with the rule. The two cases referred to in complainant's brief which are street railroad cases, are the case of the Birmingham Traction Company *vs.* Birmingham Railroad Company, 1898, 119 Ala., 24 S. C., 368, and Omaha Horse Ry. Co. *vs.* Cable Tram-Way Co., 30 Fed., 324, same case, 32 Fed., 727. The Birmingham Traction Company case was the case of a street railroad company attempting to cross the tracks which were laid on a private right of way belonging to another corporation without compensation being made. (See last paragraph of opinion.) The court holds that the company desiring to cross the private property of the complainant could not do so without compensation being made. With this principle we find no fault.

The Omaha case will be discussed hereafter.

As already pointed out, the rule unanimously announced by the courts, with the possible exception of the Omaha case, is that one street railroad corporation crossing the tracks of another street railroad corporation need not compensate that company for the cutting of the rails. Not only is this the rule of law, but counsel for the complainant, with all their industry, have not pointed out the code or statute of any State which requires compensation to be made where one street railroad corporation crosses the tracks of another street railroad corporation.

Another thing to be observed with reference to section 469 is this: Section 500 expressly confers upon one street railroad corporation the right to have its tracks cross the tracks of another street railroad. Section 469 does not confer that right upon one steam railroad to cross the tracks of another steam railroad or the tracks of a street railroad without compensation, and the right is given to the railroad, whether it be a steam railroad or a street railroad, whose tracks are sought to be crossed, to compel the steam railroad desiring to cross its tracks, to commence a suit in eminent domain

and there obtain a decree not only fixing the amount that shall be paid in damages, but likewise a decree condemning the right of way "over the one for the use of the other road." Now, if section 510 was intended to go to the extent that complainant claims for it, what earthly necessity was there for the legislature to insert section 500? The Codes of California when adopted were intended to express either the common law or such changes in the common law as the State of California desired to make. With the general rule of law before the framers of the Code, that one street railroad need not compensate another street railroad for crossing its tracks, it seems evident that section 500, in declaring that one street railroad may cross the tracks of another street railroad, embraces the common-law rule that compensation need not be made. However, in *making the crossing* it shall be done as provided in section 469. The constructions that we have given to section 500 and section 510 are entirely consistent with each other. Section 510 incorporates only so much of title 3 as pertains to railroad corporations in general. Section 469 pertaining, as we have pointed out, to the crossing of a steam railroad over the tracks of a street railroad or other railroad, it was necessary for the code framers in regulating the manner of crossings by street railroads to either make express provisions in section 500 for the manner in which crossings should be made, or, by general reference as they did, incorporate so much of section 469 as pertains to *crossings*. The incorporation of any provision of title 3 into title 4 is made by reference only.

A good statement of the rule of construction as applied when one statute is adopted by reference into another is found in the decision of Lord Denman, C. J., in re Comm'rs Lunatic Asylums, Eq., Series 366, Reg. *vs.* Stock, 82 Ad. & E., 405;

> "It is a sound rule of construction applicable to modern as well as ancient statutes, perhaps even more so from necessity in consequence of the looseness of expression which now prevails, that in construction of

> general reference in acts of Parliament, such references must be made as will stand with reason and right."

Summarizing the proposition advanced, it is submitted that section 500, having dealt with the matter of one street railroad crossing the tracks of another street railroad, the whole subject-matter of such crossing was dealt with in that section, and dealt with in accordance with the general rule of law; that the legislature intended that it should cover the whole subject-matter; that section 510 only purports to incorporate into title 4 such matters as "govern" the business and affairs of railroad corporations in general, and not those matters which from the context clearly pertain to steam railroads specifically.

Public Convenience and Necessity Demanded that the City Take the Action it Did.

The testimony of City Engineer O'Shaughnessy, A. S. Baldwin, C. C. Young, witnesses for defendants, and the communication from United Railroads of San Francisco addressed to the Board of Supervisors of the City and County of San Francisco under date of January 11, 1915, show the impelling necessity for added transportation facilities. Quotations from the testimony of these witnesses and from the written communication from the United Railroads of San Francisco are set out in our statement of facts.

The officers of the municipality would not have performed the duty they owed to the public if they had not taken steps to relieve the acute transportation problems then facing the city. It was for the purpose of solving in part such problem that Twin Peaks Tunnel was bored at a cost of approximately four millions of dollars.

Complainant admitted the difficulties of the transportation problem in the communication referred to (Tr., pp. 311 to 315). The inability of the company to furnish relief is set out in the answer of the company to the first question

submitted to the company by the Board of Supervisors. The complainant company frankly says:

> "The present policy of the United Railroads in the matter of extension of existing lines would be to meet the conditions of the growth of the city were such a policy practicable. But unfortunately, by reason of the restrictions contained in the charter, it is impossible for any private corporation to finance the construction of any street railroads in any part of the city. These charter conditions may be briefly referred to as follows:
>
> "(*a*) Minimum wage scale, $3 for eight hours, with time and a half for overtime.
>
> "(*b*) Reversion of all physical property to the city at the end of the franchise period, which is limited to twenty-five years.
>
> "When to this condition is added the heavy tax burden, it makes an impossible financial proposition."

Here is a confession by the United Railroads that it is unable to build extensions of street lines into the outlying districts to furnish the much-needed transportation, and that it cannot and will not meet the public needs.

The situation on Market street itself was bad. The double tracks of complainant company, it asserted, were then taxed to their utmost capacity. The congestion, and its inability to cope with it, were thus described in its communication of January 11, 1915:

> "It cannot be denied that during the so-called rush hours, the cars are overcrowded, but it is not true that by simply increasing the number of cars this condition can be ameliorated on those lines to which this criticism is particularly directed; the addition of cars would only tend to make a bad matter worse by reason of the fact that the capacity of the tracks in the downtown section, where the overcrowding is greatest, has already been reached, and adding cars would tend to decrease the scheduled speed so much, that the number of persons which we could carry by a given point within a given time would also be decreased."

If that was the condition on Market street in 1915, and we admit it correctly describes the congested car situation on the Market street tracks of complainant, what might the municipal officers, charged with the duty of doing those things necessary for the convenience and welfare of the public, expect to be the conditions a few years later. The city was growing steadily. As the outlying sections were built up, facilities must be furnished for the transportation of the people from these new districts into and through the heart of the downtown section. Relief could not be granted by putting additional cars on the Market street lines of the company. As we have already shown, Market street is the great artery of the city. People must use this street to reach the business center of the city. How was the municipality to solve this problem? There is only one practicable solution, and that is the plan carried out—to build the outer tracks on Market street from Seventeenth street to Kearny street and there connect with the outer tracks already on Market street from Kearny street to the Ferry, over which the municipal cars were operating by agreement with complainant company, and also to connect the Church street line with the Van Ness avenue line of the municipal railways.

The question of any added inconvenience to the public generally as a result of building the outer tracks was a matter solely within the discretion of the Board of Supervisors of the City and County of San Francisco. Serious inconvenience in this respect could not arise because of the great width of Market street. Four tracks on Market street would cause less inconvenience than two tracks on the main streets of many other large cities of the country. The only avenue of relief open to the city was to build the outer tracks on Market street.

We repeat that unless complainant company had an exclusive franchise covering these blocks on Market street, the city was not barred from taking the action it did to furnish the much-needed relief. If loss is suffered by complainant through competition, or even some loss by prospective pas-

sengers taking the municipal cars through their disinclination to cross the outer tracks for the purpose of reaching complainant's cars on the inner tracks, it is not a damaging or taking of their property contrary to the provisions of the Constitution of the United States or that of the State of California. Their franchise was not exclusive and therefore its terms are not violated. Each person or corporation using the public streets must suffer such inconvenience as may result from the use of the same street by other persons or corporations. In the regulation of traffic upon a crowded street, inconvenience and possible loss may be caused to persons or corporations who hitherto had a more free use of the street, but such regulation is necessary in the interest of the public good.

The question of how much, if any, inconvenience or loss of traffic will result to complainant because the municipal lines constituted the outer tracks on Market street is largely dependent on the traffic regulations made governing headway of cars, where the cars of the respective lines may stop for taking on or letting off passengers, and other similar matters. It must be assumed that such regulations will be fair and just. The manner of operating the cars on the respective lines is not an issue in this case and was not before the court, for the reason that at the time the case was heard no cars were operated on the tracks in question.

Why must the city forego furnishing this much-needed transportation which complainant company confesses its inability to supply? Because, according to the contention of complainant, when the legislature, in 1872, incorporated section 499 into the Civil Code—this section designed only as a limitation on the power of the city to grant under the authority conferred by section 497, and as a regulatory statute enacted under the police power of the State to meet conditions as the legislature then saw them—the section was forever beyond repeal or amendment after complainant's franchise was granted. It is unbelievable that such a con-

struction, which would paralyze the growth and development of the city, can be given to section 499.

And, finally, permit us to say that if the franchise of complainant was not exclusive, it was subject to all of its own inherent defects, one of which was the possibility that some time the municipality itself might enter into the same business on the same street.

The Soliciting of Offers of Sale of an Existing Street Railroad Satisfied the Requirement of Article XII of the Charter.

The resolution, soliciting offers and annexed to the answer of respondents, is one of a series of resolutions and ordinances passed by the Board of Supervisors of the city leading up to the issuance of bonds for the construction of certain municipally owned street railroads on streets enumerated in the proceedings. The solicitation for offers, therefore, must be read in conjunction with these proceedings, and, read therewith, it was quite easy for any railroad corporation owning and operating a street railroad in San Francisco to understand what street railroads the city desired to acquire, either by purchase or by original construction. It is true that the description of the Church Street line did not describe in detail the specific route. The proposition submitted to the electors was for the construction of a street railroad on "Van Ness avenue and from said Van Ness avenue along connecting streets to Church street, and along Church street to convenient terminals;" but this was all that is required by the charter in order that the city might incur a bonded indebtedness for the construction of the road, and nothing in the charter requires that the precise and exact route shall be set forth. The route described in the bond proceedings is definite enough to acquaint the electors, as well as the owners of existing railroads, of the route that was to be pursued generally. It was undoubtedly in the minds

of the framers of the provisions to leave the description of the route elastic enough to cover exigencies and emergencies.

The provision that offers shall be solicited is for the benefit of the electors in passing upon the question whether a bonded indebtedness shall be incurred. If there were any informalities in the issuance of bonds, a taxpayer could have prevented their issuance. While perhaps the pleadings are silent as to the sale of the bonds, there is enough in the pleadings to show that the bonds must have been sold and that the money to be used for the construction of the Church Street line on Market street between Seventeenth street and Van Ness avenue is available from the sale of those bonds.

Complainant, as the owner of a street railroad, cannot complain that the taxpayers were not sufficiently acquainted with the route of the Church Street line. Had complainant been willing to offer a railroad in operation to meet the demands for the acquisition of a railroad on "Van Ness avenue and from Van Ness avenue along connecting streets to Church street and along Church street to convenient terminals," it could have submitted its offer, together with a description of its property, to the Supervisors and the people could have had the benefit thereof in determining whether complainant's property should be acquired or whether original construction should be resorted to. In addition thereto, complainant does not allege or show it is the owner of a street railroad which it could or would have been willing to sell to the city that would satisfy the city's requirement, and the contention for this reason alone is without equity.

There is nothing in the provisions of section 2, of article XII, which would require the electors to accept an offer, although the price offered would be lower than the cost of original construction. We are at a loss to understand how complainant, as the owner of existing railroads, could prevent the city from constructing a street railroad with its funds obtained through a bond sale, because, perchance, there was a defect in the bond proceedings. For that matter, the alleged defect in the bond proceedings, if it existed,

would not in any way affect the *power* of the city to own, construct, and operate a municipal railway.

In the case of Platt *vs.* City and County, 158 Cal., 74, the court on page 89 of the opinion considered a resolution soliciting offers for a street railroad similar to the one under discussion and found no fault with it.

Counsel also contended that no offers have ever been solicited for a railroad on Market street, between Van Ness avenue and Kearny street, and between Seventeenth and Market and Castro streets. The answer to this is obvious. The proceedings of the Board of Supervisors relating to the construction of this portion of the Market Street line had, at the time of the commencement of this action, only reached a stage where preliminary plans had been called for from the city engineer. The proceedings, therefore, had not reached the point where section 2, of article XII, of the charter required the soliciting of offers.

ANSWER TO APPELLANT.

I.

No Property of Appellant is Taken or Damaged by the Building and Operation of the Municipal Road on Market Street.

The first half of appellant's brief, though subdivided into many chapters and sub-heads, really embraces but one subject—at least, culminates in one final proposition—upon which apparently appellant principally relies for a decision. Points I, II, and III, with their various alphabeticized subdivisions, present quite elaborately appellant's contention that its franchise is an irrevocable contract, the obligation of which will be impaired by the proposed municipal action of appellee; that it will be deprived of its property without due process of law; that its property will be taken without just compensation. With these are argued various interrelated points, and then the discussion of appellant reaches

its climax in the assertion that "the loss of patronage that will result to the complainant through the difficulty and danger of access to its cars by reason of the operation of the city's cars on municipal tracks between complainant's tracks and the sidewalk is directly within the constitutional prohibition against 'damaging' property without compensation 'first' paid."

In replying to this portion of the brief ending with page 76, we eliminate for the moment section 499 of the Civil Code of the State of California, the interpretation and construction of which we have already adverted to, and shall again touch.

This, then, is the position presented:

1. Appellant has a franchise from the City of San Francisco, authorizing the construction and operation of a street railway upon Market street.

2. Market street is the main artery of commerce, transportation and travel in that city.

3. Market street is of unusual width. That portion of it from Kearny street to the Ferry is unusually busy and constitutes one of the most crowded parts of San Francisco. From Kearny street to the Ferry, under agreement between the city and the appellant, there have been constructed tracks on either side of appellant's double-track railway, so that there are now on this portion of Market street four street railway tracks. The city operates its municipal cars from Geary street to the Ferry on the outer tracks and complainant operates its Sutter Street line alone on these outer tracks. All of the other lines of the appellant are operated upon the two inner tracks.

4. The City of San Francisco requires additional transportation facilities. The public welfare and necessity demand additional street railways. The appellant, conceding this fact, declines to construct additional lines or provide additional facilities. The city, therefore, has undertaken

the task. There is but one mode by which justice can be done its people, and the public welfare subserved, and that by connecting on Market street with its system already established there. The connection requires that for substantially fourteen additional blocks on Market street, exactly what is now being done for six blocks, by agreement of the parties, shall be done for the benefit of the city and to meet its absolute needs.

5. The franchise of the appellant is not an exclusive franchise, nor does it grant exclusive rights to appellant. The City of San Francisco has neither authority nor power to grant an exclusive railway franchise.

6. There is ample space on Market street to accommodate four tracks and the usual street traffic as well.

We are not dealing now with an abutting owner of the fee nor with proprietorship of the land traversed by the San Francisco municipal road, nor with invasion of appellant's easement in the soil between its tracks. We deal solely with a part of a street, for the purposes of this case unoccupied, over which the city authorities have dominion and power. In another part of this street the city has granted to appellant the right to operate a street railway. Can it be seriously claimed that the city's power by the one grant to appellant has been exhausted? If this be so, then a *non-exclusive* grant becomes exclusive, and a city, denied the power to grant exclusive franchises, by the very act of granting one not exclusive, exercises the denied power.

When the appellant took its franchise, it took it subject to the power of the city to grant similar rights.

> "Every corporation which acquires a franchise to use the city streets which is not by its terms or true construction shown or declared to be exclusive, takes the franchise subject to the power of the legislature or the city to grant similar rights to others."
>
> III Dillon Mun. Corp., sec. 1243.

We quote as well the concluding portion of the section:

> "The control of the streets above and below the surface is vested in the municipality, and if it sees fit it may authorize or require the later corporation to place its lines or appliances so near those of the first corporation as to make access somewhat inconvenient and expensive. The city cannot destroy the first corporation's lines or appliances, nor can it prevent reasonable access to them, but it is not obliged to consult its mere convenience or study to save it from expense to the detriment of the public. Hence, while the city could not grant to another the right to use the same space already occupied by a corporation, it could authorize the use of any other space provided access to the line or appliances of the first corporation was left open, even if it was less convenient and more expensive."

The public character and the paramount right of the inhabitants of a city in the streets seem entirely overlooked by appellant. Judge Dillon in concluding his discussion of abutting owners' rights sounds this warning:

> "The essential public character of streets ought never to be overlooked. Although the abutter has special and peculiar interests in the continued maintenance of the street in front of his premises, free from obstruction for non-street uses, which impair its usefulness to him, yet streets and highways are in their primary conception and essential character intended chiefly for public use for purposes of travel, passage and communication, and other legitimate street uses, and the rights of the abutter are justly subordinate thereto. The public and paramount rights in these highways ought to be exercised and controlled by the representatives of the people, that is, by the legislature or the municipality, acting under delegated authority; and any rule of law, resting alone upon judicial creation, which denies or materially restricts the paramount authority of the people over the uses to which the streets and highways may be devoted in the public interest, is of doubtful legal soundness and of doubtful economic value."
>
> III Dillon Mun. Corp., sec. 1245, p. 1996.

In summing up his elaborate dissertation on street franchises Judge Dillon says:

> "4. As legislative authority is necessary to enable a company to construct and operate a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down. Nor can an individual or another company, at pleasure and without legislative authority, construct a rival line in the same highway. But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms or by plain or necessary implication, and therefore the legislature may, at will and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive."
>
> III Dillon Mun. Corp., sec. 1280.

The city, of course, had the right to use its own streets in providing for the wants of its people. Indeed, under the facts of this case, it not only had the right, but upon it devolved the duty to solve its transportation problems. To deny the city the use of an untouched portion of its streets in its paramount duty to serve its inhabitants, because it had granted a non-exclusive easement in another part of its streets, would destroy the essential public character of its highways and transmute their primary purpose.

> "Municipalities are generally invested with the power either to construct their own works for furnishing water or light, or to grant a franchise and make a contract with some corporation or individual for that purpose. The great weight of authority in the absence of something else to manifest a contrary legislative intent is to the effect that the exercise of one of these powers does not *ipso facto* preclude the adoption of the other, and that the mere fact that a franchise not expressed or plainly appearing to be exclusive, has been granted confers no right upon the

> grantee to object to a similar franchise being made, or to the exercise by the municipality of the power to construct its own works."
>
> III Dillon Mun. Corp., sec. 1308, p. 2160.

Upon the general principles which we suggest we do not attempt to multiply authorities. These may be found under the quotations from the various text-writers to which we advert. Our apology for suggesting principles general in character concerning which there is now a crystallization of sentiment is that the appellant apparently argues the possession of some peculiar or superior right in the streets of the City of San Francisco under its franchise, a right in the street, which we may infer is greater in degree, with stronger attributes than that of an abutting owner, and paramount even to the right of the public. On the other hand, we assert that the city's right to make additional grants of its streets is abundantly supported by authority, and that the appellant has acquired no more by its franchise than the right to use the streets as a highway in common with other citizens.

> "Whenever the public interest demands the legislature or the local authorities may grant the use of any streets, already occupied by a street railway, to another person, natural or artificial for similar purposes. That a city council cannot deprive itself or its successors of the right to make additional grants in or crossing the same street is abundantly sustained by the authorities."
>
> Booth on Street Railways, 2 Ed., sec. 108, p. 197.

We would be of little service to the court by a lengthy discussion of the authorities cited by the appellant, nearly all of which deal with the property rights of abutting owners, and many of which relate to steam railroads. The remedies of abutting owners are now firmly fixed, and the differences between steam railroads and street railroads apparently clearly defined. A mere examination of the text-writers and

the cases will leave even the casual reader little doubt as to the rights and liabilities of steam railroads, and the obligations due to abutting owners. The case here, however, cannot rest upon such conclusions. The appellant must finally assert its right, not upon the law defining remedies to abutting owners, nor injuries inflicted by steam railroads upon the right of way owned in fee by steam railroads, but upon some peculiar obligation arising from the specific facts of this particular controversy. A study of appellant's brief makes this apparently obvious, and in the final analysis its argument is substantially that the obligation of its contract is impaired; that there is a taking or damage of its property because its double-track street railway must be operated on the inner two tracks on Market street, while the city operates its street railway on the two outer tracks.

We have seen in the authorities cited that it is not every injury or damage that impairs the obligation of contracts; that contracts must necessarily be taken with the "congenital defect" (the language is that of the Supreme Court) that the paramount rights of the public may be subsequently asserted; that such assertion may decrease the value of a franchise or diminish the profits flowing from it. And we have seen that under such circumstances the contract having impressed upon it this congenital defect or burden there occurs no impairment of the obligation and no right accrues under the Constitution.

The issue may be narrowed, therefore, to the question whether the operation of the street cars of the city causes such physical interference with appellant's rights as legally to entitle appellant to injunctive relief. In the initial stages of an argument upon this subject, we think these propositions self-evident:

> *a*. That the city did not exhaust its power over Market street by the grant of the franchise to appellant.
>
> *b*. That the city had the right to grant other franchises upon Market street for street railways.

c. That competition from which appellant suffers affords no ground of action.

d. That injury to the convenience of appellant or inconvenience caused it give it no new right, and

e. That appellant took its franchise impressed with the condition or burden that other franchises of like character might be granted.

Of course, if these propositions be accurately stated, the conclusion would seem naturally to follow.

If the position of the appellant be sound, that the inconvenience and interference with access and deterring of passengers from taking cars upon the inner rails afford ground for injunctive relief, then there could never be two street railways upon the same street. Assume in a busy quarter of a modern city a double track street railway. Upon one side only is there another track and another railway operated. Obviously upon the schedules required by the exigencies of modern urban life the cars upon both railways will be numerous and run at the briefest possible intervals. A single track upon one side will deter some passengers, for a time at least, from taking the car upon the inner track. It will cause inconvenience, and, from the operation of this single track, will flow all of the consequences described by appellant, less only in degree. If appellant be right, because of this interference the single track road could not be operated; the use for which the highway was dedicated is denied; the public are deprived of the readiest means of transportation and the whole street becomes, for all practical purposes, the property of the corporation operating the inner tracks. In the specific case, with the needs of San Francisco admitted; and with the inability of the appellant to meet those needs, the law, according to appellant would put San Francisco in a straight-jacket with its main thoroughfare, and deprive the public of the very rights that it has in the street, and destroy the purposes for which the streets were dedicated and maintained. And if the argument of appellant is car-

ried to its logical conclusion, there could be upon Market street in San Francisco no other organized means of transportation than the United Railroads operating its cars upon its two tracks.

There is no conflict of authority now upon the right of a municipality where a franchise, not exclusive, exists, to grant others of like character for the same streets. This is settled law and the definite rule of conduct of every municipality in the country. If, however, the use of streets, not occupied by a non-exclusive railway franchise, is subject to claims for damages for inconvenience, annoyance, etc., the municipality's right over its streets is a barren one, and a franchise, first, in point of time, confers upon the grantee in fact not only the particular easement but an absolute right to the whole street. It is not difficult to see, if the appellant's rule be correct, that the *deterrence*, which ultimately will result, will be the deterrence of a city from granting other franchises and a *deterrence* to the inhabitants of the municipality in the use of the streets, and finally a *deterrence* of the growth, development, and prosperity of a whole people.

From the time of the Charles River Bridge case until the present there has been no adjudication save one, of which hereafter we will speak, which would, in any degree, justify the amazing rule contended for by plaintiff.

Judge Peckham in an early New York case writes thus upon the subject:

> "The case, then, must turn on the one question, whether the running by the defendants of a track on either side of the plaintiffs' track is such an actual taking of the property of the plaintiffs as cannot be done without compensation; for, although there may be some question whether the crossing of the plaintiffs' track would not be such a taking as would require compensation, yet no such question is raised by the bill and answer on the papers on this motion. There is very little force, I think, in the objection

that it is proposed to lay the defendants' track so near to the plaintiffs' as to injure or practically interfere with their running. The track proposed is the same distance from the plaintiffs' track that the plaintiffs' tracks are from each other, viz. five feet. The interest which the plaintiffs have in Fourth avenue is a right-of-way; their franchise consists in their right to lay and use exclusively a railroad, subject to the duty of running public cars thereon. They have no control or interest whatever in that part of Fourth avenue not occupied by their own road, except that common to the rest of the community, *i. e.*, that it shall be kept free and clear for public use.

"All and any persons have a right to pass along said street. They cannot stop or obstruct it. The crowd of passers may be so great as, in itself, to be an obstruction, yet, so long as it is a moving crowd, whether of individuals or vehicles of any description, it is a legal use of the street. Were the defendants, then, about to run any number of omnibuses, or other ordinary wheeled vehicles, the plaintiffs could not complain. The injury to their own road might be as great or even greater than that which may accrue from the proposed action of the defendants, and yet, so long as their action was not malicious, it cannot be pretended that the plaintiff would have a right to complain.

"This shows that the consequence of which the plaintiffs complain, *i. e.*, difficulty of access to their cars, may exist, and the plaintiffs have no cause of action; in other words, the fact may exist, and be no wrong. Can it, then, be claimed, that that, which, if caused by one means, is not wrong, becomes a wrong on being effected by another means?

"The use of the city street by a railroad for running public cars, has been decided to be a public use, the exclusive right to the track being controlled by the public right to the cars, that being, as the running of the defendant's cars would be, but an exercise by the public of the public right-of-way. The cars will not run, unless in obedience to the public wants, for, otherwise, they would not pay. Should they do so, for the mere sake of malicious annoyance to the plaintiffs, other questions would arise. If, then, after the running of the plaintiffs' road, the public retained a

right to the use of the rest of the street, as a public street, and for public use, and if this proposed use by the defendants be, as has been decided, a public use, the plaintiffs have suffered no infringement of their rights or property, and the injunction must be dissolved, with $10 costs."

The New York and Harlem Railroad Company *vs.* The Forty-Second Street, etc., Railroad Company, 50 Barb., 285.

Can there be any doubt that the rule applicable to the New York case and the case at bar is fairly and accurately stated by Judge Peckham? Is it not true, paraphrasing the learned Judge's language, that the interest of the United Railroads on Market street is a right-of-way, and the United Railroads has no control or interest whatever in that part of Market street not occupied by its own road, except that common to the rest of the community, *i. e.*, that it shall be kept free and clear for public use? Can it be denied that after the United Railroads run their cars the public retain the right to the rest of Market street as a public street and for public use, and if the public propose thus to use the remainder of Market street the United Railroads have suffered no infringement of their rights or property?

A very interesting case, in which, it is true, the question was one of crossing but involving the use of the street, as well, is The Kansas City, St. Joseph & Council Bluffs Railroad Company *vs.* The St. Joseph Terminal Railroad Company, Appellant, 97 Mo., 457.

The testimony, as indicated at page 465, apparently was that plaintiff would be damaged by impeding and delaying its trains in crossing Fourth street. The Constitution of Missouri provides:

"That private property shall not be taken or damaged without compensation, and such compensation must be ascertained and paid to the owner, or into court for the owner, before the property shall be disturbed, or the proprietary rights of the owner therein divested."

The question for determination was thus stated by the court:

> "The general question to be determined is, will the carrying into execution of this purpose of laying its track in said street in the manner stated and operating its cars thereupon in the transaction of its business as a common carrier, *damage the private property* of the plaintiff? There is no question of the appropriation of such property in the case, for although the plaintiff is the owner in fee of the two blocks abutting on each side of Fourth street at the point of crossing, with all the appurtenances thereto belonging, is the owner in fee of the soil over which said street is located subject only to such a public easement as the city acquired by virtue of the decree recited, and of the tracks located across said street, it is not suggested that the defendant's operations will disturb, or for that matter damage, any of this corporeal property. The damage, if any, must be to some incorporeal private property of the plaintiff, and it is claimed that the plaintiff has, if we apprehend correctly, the argument of counsel, two of such items of property that will be damaged by the construction and operation of the defendant's road across its tracks: first, the easement which it has in said street as an abutting proprietor, and second, the easement which was reserved to it, in the decree in the condemnation proceeding."

The opinion then proceeds:

> "As to the first of these rights, it may be said, if by virtue of that decree, Fourth street, as located across plaintiff's property, became a public street in the usual and ordinary acceptance of the term, and as used in the statute, then the plaintiff's easement therein as abutting proprietor can in no way be damaged by the construction of defendant's road, since during its construction it is not proposed to disturb plaintiff's pass-way, and afterwards it will have the same free and unobstructed use of the street as it had before, by the same vehicles drawn upon the same tracks; and every one that desires will have the same unobstructed ingress to, and egress from the plain-

tiff's abutting premises that they have had before. The only damage that can be conceived of, or that is suggested to such easement must flow from the operation by the defendant of its track in the street in its business and the delay plaintiff's trains at times will be subjected to in crossing the stree. by reason of the occupation in the street by defendant's trains of the same space at which it desires to and can alone cross with its trains. But that space being in a public street, the defendant's tracks having been authorized to be laid by the city, its use by the defendant for the purposes of passing to and fro over it with its trains is a legitimate use belonging to the defendant company, as well as to the plaintiff, in common with every other citizen desirous of passing over it with his vehicles. The damage caused by such delay is of the same character as that suffered by every traveler on a public highway whose movements are retarded by those of another traveler on the same highway, is not peculiar to an abutting proprietor although by reason thereof he may more frequently have use for, and be more frequently delayed in his movements in the street than other citizens. The damage resulting from such delay and inconvenience is not the subject of compensation within the meaning of Article 2, section 21, of the constitution.

"This brings us to the consideration of the particular and controlling question in the case, and that is, has the plaintiff company, by virtue of the decree entered in the condemnation proceedings, a private property in that part of Fourth street which runs through its premises, other than the fee in the soil, and the tracks which are located thereon; upon which we have seen the defendant company proposes to impose only such servitude as they are subject to in a public street, which would be damaged by the operation of the defendant's proposed railroad tracks. In other words, has the plaintiff a right of pass-way in that street private and peculiar to itself, not shared by the general public? If so, then it has private property that may be damaged by the operation of defendant's track. If, on the other hand, it has only a right of passway in the street in common with every other citizen, then it has no private property to be

damaged by the exercise by the defendant of its common right of pass-way conferred upon it by the laws of the State and the ordinance of the city.

The court indulges in a brief discussion of the terms of a decree upon which the title of plaintiff rests, and then says:

"If the proceeding had culminated in a judgment of condemnation *in invitum*, in the usual and ordinary way, and at the same time or thereafter the city had given permission by ordinance to the plaintiff to lay down its tracks in the street for the purposes of business and thereafter had given like permission to the defendant company, there could be no question that the rights of each would be equal and co-ordinate in the use of the street, and that the rights of both would be co-ordinate only with the equal right of every other citizen to the use of the street as a public highway, and there would be no question in the case, and no case."

The opinion concludes thus:

"It is clear, we think, that the plaintiff has no right of pass-way either along or across Fourth street that is private property; that as to such right of pass-way it stands in exactly the same situation as the defendant does, or any other railroad company would which obtains permission from the city authorities to lay down its tracks in that street. As the defendant company has under the law, and the ordinance of the city, the right to lay down its tracks on Fourth street, and to cross the tracks of the plaintiff, first having made compensation for any private property belonging to plaintiff that it may be necessary to take or damage in so doing, and it appearing that no private property of the plaintiff will be appropriated or damaged by the defendant in the construction of its railway in said street, in the manner in which they propose to construct it or by the operation of its trains thereon, and that the only damage plaintiff can necessarily suffer by reason of the construction and

operation by the defendant of its tracks on said street, will result solely from the occupation by the defendant at times for its passing trains, of a space in said public highway, needed at the same time by plaintiff for its passing trains, a damage not private, but common to all the public who may have occasion to use the street, occasioned by a public service to which said street is legitimately subject, and for which the plaintiff is not entitled to compensation, we see no reason why the defendant should be restrained from laying down its tracks as it proposed to do in accordance with the permission of the authorities of the city of St. Joseph in said street."

May we not paraphrase the language of this decision? The only damage the United Railroads can necessarily suffer by the construction and operation of the city's street railway will result solely from the occupation by the city at times for its passing cars, of a space in the public highway, needed at the same time by plaintiff for its passing cars, and this damage is not private, but common to all the public who have occasion to use Market street, occasioned by a public service to which Market street is legitimately subject, and for which the United Railroads is not entitled to compensation.

A later case from Missouri which upon its facts is not dissimilar from the case at bar is the St. Louis Transfer Ry. Co. *vs.* The St. Louis Merchants Bridge Ry. Co., 111 Mo., 666.

In this case the plaintiff railroad was operating a double track railroad line within the city. Defendant railroad subsequently was authorized to construct a double track railway upon some of the streets occupied by plaintiff. The street subjected to the use of both companies was 100 feet wide, but without pavements or sidewalks, and situated, apparently, in the industrial part of Saint Louis. A temporary injunction was granted the plaintiff restraining the defendant from constructing its railway upon the street oc-

cupied by plaintiff's tracks. This injunction was on the trial of the merits dissolved.

The court say:

> "The evidence tended to show that the width of Hall street (one hundred feet) was amply sufficient for the construction and operation of both lines of railroad upon it as provided for in the ordinances, according to either of the plans proposed; that the only interference in the operation of either would be the necessary delay in the movements of its trains or cars at the crossings when that space should at the time be occupied by the trains or cars of the other moving over the same crossing:
>
> "From the evidence of the business now being done on plaintiff's road in the street and the immediate use the defendant proposes to make of the street for its business, it is apparent that the business of both can be conducted on the street for the purposes for which they were created without serious injury to the interests of either; and while it is true that these delays in the operation of plaintiff's road will be increased and the difficulties and dangers attendant upon such operation enhanced as the business of each road in the street increases, yet it is far from appearing that the legitimate operation of both would ever become impracticable under such reasonable rules and regulations as self-interest would dictate that each should observe in moving its trains and cars, and that might be prescribed by the city in the exercise of its legitimate power to regulate the use of its streets. And while the value of plaintiff's franchise will be depreciated to the extent of the inconvenience and delay occasioned by such crossings as the result of a healthy competition with it by the defendant's road for a class of business necessary to be done for the public good, which alone affords a reasonable pretext for the existence of either road in the streets of the city. Such depreciation is *damnum absque injuria*, since the city could not grant the plaintiff an exclusive right to the use of the street for its business. *Railroad vs. Railroad*, 97 Mo., 457. On account of such depreciation plaintiff cannot complain, since its own grant was dependent on the condition

> that its tracks should be so constructed and operated as not to interfere with the public use of the street; such being the character of the use to which defendant proposes alone to subject it."

We pause to suggest that upon six blocks of Market street, at the present time, as has already been said, the United Railroads and the city are operating their two distinct lines. It is true this is by virtue of an agreement, but it may be assumed that under regulations which the prudence of each would dictate, and under legitimate orders of the municipal authorities, both lines are operated with a minimum of inconvenience to either. As observed in the case from which we have just quoted, it is true there may be delays, which will be increased in the operation of plaintiff's road, and difficulties and dangers attendant upon such operation; yet the operation of both roads, it is demonstrated, is not impracticable under such reasonable rules as self-interest has dictated and such regulations as might be prescribed by the city for the use of its streets. It may be true, paraphrasing the language of the Missouri Supreme Court, that franchises of the United Railroads would depreciate to the extent of the inconvenience and delay occasioned, but such depreciation is *damnum absque injuria*. The United Railroads cannot complain of such depreciation, because its own grant was dependent on the condition that its tracks should be constructed and operated so as not to interfere with the public use of the street, and the city proposes, by its additional tracks, to subject the street to this character of use and this alone.

The Supreme Court of Missouri states the position of the plaintiff from which it dissents, and adds:

> "The assembly, knowing the condition of the street, and the public use to which it was subjected by plaintiff with its assent, proposed in unmistakable terms to subject the street to another public use of a similar character by the defendant; in doing so, however, it did not propose to deprive the plaintiff

corporation of the use by it of the street, to which the assembly had theretofore assented, which use was subject to the right of every other citizen and of every railroad company having the assent of the city authorities to cross its tracks in the legitimate pursuit of their business."

The opinion concludes:

"The privilege which a railroad company acquires by the assent of the city authorities that its tracks may be laid down and operated in the streets of the city can never be more than a qualified right to the use of the street as a public highway in common with every other citizen, and as no one assembly can by giving its assent to one company limit the power of a subsequent assembly to give a like assent to another, the right is further restricted to the use of the street as a highway in common with any other railroad company acquiring a similar right in the same street by the assent of the city authorities. For convenience this privilege may be, and, in common parlance, is called a right of way, but it is far from being an absolute and unconditional one, such as admits of no obstruction by crossing or otherwise without consent, and is always burdened by the right which every railroad has to cross the tracks of another imposed by statute law. It was this privilege, this qualified right of way of plaintiff in Hall street which was not to be interfered with, and which will not be interfered with, within the meaning of the ordinance by the defendant in laying down its tracks and operating them as it proposes to do upon territory in said street not occupied by the tracks of the plaintiff already, or which it has a right by ordinance to occupy for that purpose, whenever in the future it may have occasion so to do.

"The right to cross plaintiff's tracks in the street is derived not from the ordinance giving assent, but from the general law of the land, and is the only interference to which plaintiff will be subjected."

It is most earnestly submitted that upon both reason and authority the plaintiff's property is neither taken nor dam-

aged, within the meaning of the law or the State or Federal Constitutions.

II.

The Omaha Horse Railway Company vs. Cable Tramway Company, 30 Fed., 332; 32 Fed., 727.

Appellant's reliance for a reversal of the judgment here is this case. It is obvious from its brief that upon this authority is builded appellant's hope of success. It is the one case which lends color to its view and comfort to its cause. And while all of the other adjudications unerringly point one way, appellant apparently deems this single case sufficient to justify its position. The case was decided in 1887 by a very learned judge. The examination of the two opinions rendered enables us fortunately to understand the judge's view of the law and exactly what led to his conclusions. It may be remarked at the commencement of any discussion of these opinions that they were rendered at a time when street-railway law had not approached its present clarity nor certainty. The facts dealt with a franchise for a horse railway in the city of Omaha and a subsequent franchise for what the judge evidently regarded as a new mode of street transportation—a cable tramway. The two were regarded apparently as wholly dissimilar modes of street travel and transportation, as presenting against the old-established and plodding horse car the new and novel, and as yet but little developed, cable road. The decision seemed to have been influenced in some degree by the differentiation in the learned judge's mind concerning these two modes of travel. Apparently too, it was the first instance which had been brought to the attention of the court of street railroads parallel to others in cities—that which is so common today; and that which is now recognized by universal authority was then novel and uncommon. The opinion as found in the case, when first reported in 30 Fed., holds the plaintiff not

to be entitled to compensation for any injury which might result from competition, and then the court proceeds:

> "But there are at least two matters which are clearly proper matters of consideration in estimating the plaintiff's damages: First, the inconvenience and annoyance which results from the crossing of plaintiff's tracks by the track of the defendant; second, the interruption of access to plaintiff's cars by the track and cars of defendant between its track and the sidewalk."

The court therefore reached the conclusion that there were two elements of damage for which plaintiff should be compensated: crossing and interruption of access. It may be observed that ultimately no damages were allowed under the first classification. But it is respectfully submitted that the foundation—the basic principle—upon which a right to damages in both cases must rest is the same. It is in reality inconvenience and annoyance and interruption of access at crossings and where the lines parallel each other. The same elements constitute the damage in each. Logically there can be no difference in the reason for allowing damage for annoyance at crossings and that for allowing damage for annoyance or inaccessibility at other points because of the juxtaposition of tracks. It is pecuniary loss which the court determines may be suffered and for which the plaintiff was entitled to compensation. It matters not that this pecuniary loss arises from the necessary stoppage at a crossing of plaintiff's cars, caused by the passage of defendant's cars, or that the near approach of one to the other at the crossing would deter passengers for a brief period from entering, or deter them altogether in some instances, or whether the damage arises from a car upon a parallel track or running upon a parallel track which will halt the onrush of passengers to the track beyond or deter some from going to the further track. The reason for the loss and the damage is identical. Legally it cannot be distinguished. We repeat it, it is after all inconvenience and annoyance—the stoppage of the travel—to the

plaintiff's cars for a brief period; or, in some instances, deterrence of passengers, but after all the inconvenience and annoyance and deterrence arising from like causes. That which is designated by the court the first matter of consideration in estimating plaintiff's damage—the inconvenience and annoyance resulting from crossing of plaintiff's tracks by the track of defendant—is now so conclusively settled by uniform authority it is no longer debatable. Today, under the general rule, no plaintiff would be heard in a court of equity asking for damages for the mere, ordinary crossing of its street railway by a rival. Some of the authorities upon this subject have been quoted in the first part of this brief.

Nellis, on Street Railways, Vol. I, page 254, Sec. 108.
Am. and Eng. Enc. of Law, 2d Ed., Vol. 27, page 24.
Lewis, on Eminent Domain, Vol. II, 3d Ed., Sec. 424, page 768.
Consolidated Traction Company *vs.* South Orange and Maplewood Traction Company, 56 N. J., Eq. 569.
Market Street Railway Company *vs.* The Central Railway Company, 51 Cal., 583.

"The construction and operation of a street railway is, as we have elsewhere seen, a proper public use of the street and not an additional burden thereon; and when a street railway is constructed across a steam railroad which intersects the route of the street railway, the steam or commercial railroad company cannot claim compensation from the street railway company as for an additional burden, because the rights of the steam railroad in the street are subject to all proper street uses, among which is the use of the street for street railway purposes. And the same principles apply when the tracks of one street railway are laid across the tracks of another street railway at intersecting points."

3 Dillon Mun. Corp., 5th Ed., sec. 1241, page 1983.

If the rights of the railroad in the street are subject to all proper street uses, among which is the use of the street for

street railway purposes, does it not seem plain that the inconvenience or the expense or the discomfort or the alleged "inaccessibility" which may be the natural result of the legitimate use of the street by the operation of a street railway are not proper subjects of legal cognizance and for them damages cannot be allowed?

The opinion of the court in the Omaha case we respectfully submit did not sufficiently consider the prime purpose of streets, the paramount rights of the public nor the status of street railroads legally and legitimately operating. If the conclusions of this opinion be correct, there cannot really be two street railroads upon the same street. A most slender grant, without authority or intent to confer exclusive rights, would preclude any other grant upon the same street. When the amount of damage which might be recovered in thickly populated territory, under circumstances such as are disclosed by the Omaha case is considered, the decision in that case is tantamount to holding that but one grant to one street railway may be made by any municipality, no matter what the urge or necessity.

The owner of the fee, it will be admitted, is not entitled to damages. The rule enunciated in the Omaha case could only work incalculable harm to growing municipalities. New rights, new privileges, additional emoluments, by a simple franchise, are accorded. A city is precluded from the performance of its very fundamental function by another contract or another franchise or by exercising its own sovereign power. Communities will be placed in straight-jackets, from which they cannot emerge except upon payment of exaggerated sums. The public welfare is denied. Such consequences the law never intended, and against such consequences the very essence of logic and law rebels.

The rule respecting crossings is very plainly stated in *Chicago, etc., Railway Company vs. Chicago Street Railway Company*, 47 Am. State Reports, 264:

> "The use of the street by the appellant is subject to the easement in the public and the burden of keep-

ing the street crossing over its tracks in such a condition as not to impede or obstruct the public easement and use of the street by the public generally is a burden already resting on the appellant. That burden is in no way to be added to or increased by the crossings appellee proposes to construct. So long, therefore, as it is a settled law of this State that a street railway is not an additional burden to that of the easement which the general public has in the street and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. * * * Appellant contends that this will be a burden and a hindrance to the free and obstructed use of the appellant's steam railway which, it is claimed, is a taking of private property without just compensation in violation of the Constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway but, having obtained its right of way subject to the burden of the easement in the public generally and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof in the ordinary and proper manner for its street railway. The complaint shows that appellee was only proposing to use the streets at the crossings in the ordinary and in a proper manner for the construction of street railway crossings and that it had been hindered and obstructed therein by the appellant in the use of force. It would therefore not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right-of-way over and across the streets named, free from the burden of the public easement, a part of which belongs to the appellee—the street railway."

Compare the language of the Omaha case in 32 Fed.:

> "A railroad track with passing cars between plaintiff's track and the sidewalk, the ordinary passageway of foot passengers, impairs more or less access to plaintiff's cars. It is a direct hindrance and injury to accessibility thereto. Why should this hindrance and injury be not a legitimate element of damages upon the same principle that controls in the illustration cited?"

The reason is that stated in the Indiana case cited: Because the plaintiff obtained its right of way subject to the burden of the easement in the public generally and the new street railway is entitled to the use of that easement and the appellant's rights were subject to the right of the new street railway to use the street.

No private property is taken without just compensation, because it was not proposed in the Omaha case nor is it proposed in this case to take from plaintiff anything it ever owned. The hindrance and the injury referred to in the Omaha case cannot be a legitimate element of damage because plaintiff there never owned its right of way over and across the streets free from the burden of the public easement, part of which belonged to the other street railway. The reasoning in the Indiana case is conclusive. Its logic is unanswerable. It announces the rule about which now there is no doubt.

Another case, in which one of the leading cases cited by appellant here is clearly distinguished (Ga. Midland & G. R. Co. *vs.* Columbus & Southern Ry. Co., 15 S. E., 305) which succinctly states the rule, is *Southern Railway Company vs. Atlanta Railway & Power Co.*, 36 *S. E. Reporter*, 873:

> "But in the present case we fail to see that the defendants have invaded or were seeking to invade any legal right of plaintiff. As above indicated, when the plaintiff was permitted to construct its track across an existing street or public road, it did so subject to the condition that it must submit to the in-

creased inconvenience which might result from the growth and development of the city or country and the consequent increase of travel in the usual methods along such street or road. It acquired only an easement; that is, a privilege of crossing this street and road in the transportation of its freight and passengers. It may be that the crossings of defendant's tracks over this street and highway would cause inconvenience to the plaintiff, but as we have above demonstrated, this use thereof by the defendants, instead of constituting any burden or servitude upon them is intended for the convenience and benefit of the traveling public on these streets. The question as to whether or not their construction was necessary and important in order to accomplish such a purpose has been passed upon by tribunals constituted by law to decide such issues. There is nothing in the record to show any abuse whatever of the exercise of that power. When plaintiff therefore obtained its license to cross these highways, it necessarily took the same subject to any increased inconvenience which might arise by reason of the demand or want of the public for greater facilities for traveling. We are at a loss therefore to see how any legal right of property of the plaintiff will be invaded or in any wise affected by the exercise of the rights and franchises which the street railway companies are attempting to use in the present instance. It follows from the above that no legal right of plaintiff has been encroached upon and none of its property has either been taken or threatened to be taken or damaged in contemplation of law."

And it is for exactly the reason that the plaintiff in the Omaha case and the appellant here took their easements subject to any increased inconvenience which might arise by reason of the demands or wants of the public for greater facilities for traveling that neither was entitled to recover for what, in the Omaha case, is designated inconvenience and annoyance and interruption of access. Reason and authority alike demonstrate that the elements of damage allowed in

the Omaha case constituted in reality neither a taking nor a damaging of property within the constitutional inhibition.

See also

N. Y. & H. R. R. Co. *vs.* 42d St. R. R. Co., 50 Barb., 285.

Kansas City, etc., Co. *vs.* Council Bluffs, etc., R. R. Co., 97 Mo., 457.

St. Louis Ry. Co. *vs.* St. Louis, etc., Ry. Co., 111 Mo., 666.

There is within the very opinion itself the evidence that the conclusions were reached from a wholly erroneous premise. The learned judge in justifying his conclusions in the *32 Fed.* says:

> "Take this illustration: A railroad company condemns a right of way through a farm; the value of the strip of land thus taken is always awarded as damages; so also the injury which results to the balance of the farm by reason of the appropriation of the strip taken to the contemplated use; and in this injury is considered the difficulty of passage, the impairment of free access between one part of the farm and the other. The presence of the railroad track, with its moving trains through the middle of a farm, causes both risk and inconvenience in passing from one part of the farm to the other. And this inaccessibility, as we may call it, forms one element of damages."

Another illustration of a similar nature:

> "Suppose the owner of a lot in the city builds a store in the rear of that lot, leaving vacant ground between it and the street. If a railroad company condemns a right of way over his vacant ground in front of his store, thus interfering with freedom of access from the street, the same rule in estimating damages would apply and the inaccessibility would be declared a proper subject for compensation. ***This principle controls the case at bar.***"

The illustrations properly state the law in the specific instances suggested. The principle of these illustrations, however, does not control the case at bar and cannot be the rule. From the erroneous premise that the principle which governs abutting owners controls in the Omaha case, the conclusion of the judge naturally followed, but the principle which controlled in the Omaha case was not and could not be that the plaintiff railway company owned the street, that it had an absolute property in portions of the street not granted to it, and that it could for itself direct therefore the uses to which the public street could be put.

The rights of an abutting owner whose land is cut off by a railroad company are vastly different from the rights of a street railway company in the remaining portions of the street not covered by its tracks.

The principle which should have obtained in the Omaha case is that laid down in the New York and Missouri cases above quoted. The horse railway in the Omaha case took its right of way subject to the burden of the easement in the public generally; the cable tramway was entitled to the use of that easement and the right of the horse railway in the parts of the street not covered by its franchise were subject to the right of the cable railway to use those portions.

The cases cited by counsel for complainant in addition to the Omaha case do not support their contention that property of complainant is damaged contra to the constitutional guaranty.

Before discussing these cases in detail we desire to again advert to the fundamental rule of law governing the character of complainant's franchise. This rule cannot be lost sight of in determining the application of those cases to the case at bar.

Heretofore we have cited numerous cases, of which the Knoxville case is the leading one, showing that it is now the

firmly established rule that where a water company has been given a franchise to supply a municipality with water, unless it is unequivocally and expressly stated in the contract itself that the municipality will not thereafter engage in the business of furnishing water to its inhabitants, the city is not precluded therefrom. These cases were cited upon the proposition that complainant's franchise did not exclude the municipality.

Is the investment of a railroad corporation entitled to greater protection under constitutional guarantees than that of a water company? Is the franchise of a railroad corporation to be measured by different rules than that of a water company? Is the contract of a railroad corporation more sacred in the eyes of the law than the contract of a water company? Is the right and duty of a municipality to furnish its inhabitants with water different in legal character than its right and duty to furnish transportation? If the answer to these questions must be in the affirmative, it must be given with the admission that constitutional guarantees are for the favored few and not for all; that the rights and powers of municipalities can be exercised in opposition to the private interest of all but the favored few; and on reaching the threshold of the latter interest the exercise of those powers and duties must halt. The mere statement of the proposition carries its own refutation.

It is not difficult to see why controversies of the character involved in this action have not risen heretofore. For many years it has been the policy of municipalities that, although private interests were supplying water, the cities themselves have taken over in whole or in part the duty toward the inhabitants; and though private investment and private interest might become seriously affected, or even destroyed, unless a city had unequivocally and expressly prevented itself from performing this duty, the courts have not restrained the city from so doing.

It is only in recent years, and then only in few instances, that any city has undertaken the great problem of transporta-

tion within its limits, and, whether we agree with the principle or not, we cannot shut our eyes to the fact that public opinion and public interest require that cities undertake this obligation to their people in greater degree than they have heretofore.

At this point we desire to cite to the court two additional authorities upon the proposition that unless a franchise unequivocally and expressly contains the provision that the city shall not undertake the business of supplying its inhabitants with water, a franchise to a private company will not preclude the city from so doing. The cases referred to are:

Mayor, etc., of the City of Meridian *vs.* Farmers' Loan and Trust Co., 143 Fed., 67.

Water, Light, and Gas Co., of Hutchinson, Appt., *vs.* City of Hutchinson, *et al.*, 207 U. S., 385; 52 L. Ed., 257.

In the first case the Water Company was incorporated by a special act of the legislature of Mississippi to furnish all water demanded to the inhabitants of the City of Meridian. Subsequent to that special act, the charter of Meridian was amended so as to permit the city to enter into a contract with any person or company to furnish water to the inhabitants of Meridian and for all municipal needs. Thereafter, the city of Meridian solicited propositions to build water works and to furnish the city with all necessary water. In response to the city's solicitations, W. S. Kuhn offered to build water works and to furnish water to the City of Meridian for all its needs. A contract was entered into with Kuhn by which a system of water works was specifically set forth, prescribing the mileage of the distributing system and the character of machinery, with the proviso that these should be increased from time to time to meet the demands of the city. The contract was to continue for a period of twenty-five years unless the same should be terminated by purchase, and the grantee was required to continuously furnish water, not only to the inhabitants of the city, but for all municipal needs during

the term of the franchise. The proviso of the contract for the termination thereof by purchase was that the city could at any time take over the water works by payment to the grantee of the full value thereof to be fixed by arbitrators. The contract further permitted the mortgage of the water works, franchises, and rentals. Prior to the time the city decided to build water works of its own, the city desired to take over the water works of the company, but being dissatisfied with the award of the arbitrators, declined to do so. Thereafter the city undertook to build waterworks of its own, and for that purpose voted bonds. It was claimed that this action of the city not only impaired the obligations of the grantee's franchise, but also violated the provisions of the constitution that property should not be taken without due compensation. The court says:

> "The contract here is one in which a municipal corporation makes a grant in which the public has an interest. When a municipal corporation is exercising its functions for the public good, it is not to be shorn of its rights to continue to exert its power for the general good by mere implication. If by contract it may under the circumstances restrict the exercise of its public powers, the intention to do so must be shown by apt words so clear as not to reasonably permit any other construction."

The court therefore declined to interfere with the city's proposal to build waterworks of its own.

The case of the Water, Light, and Gas Co., etc., *vs.* the City of Hutchison, *supra*, is a case in which the same principle is laid down. The facts of that case are as strong in favor of the company as those in Mayor, etc., against the Farmers' Loan and Trust Co., et al.

We say, therefore, that if the principle enunciated by the courts over and over again in litigation between water companies and municipalities is to be applied to this case, unless, forsooth, the rights of a railroad corporation are more sacred than those of a water company, the conclusion is irresistible that the franchise of the plaintiff in this case is

not exclusive. However, if the argument of complainant's counsel is to be followed to its logical conclusion, although the city did not grant to the United Railroads a franchise to exclude the city from thereafter furnishing to its inhabitants transportation, the franchise, nevertheless, is exclusive, because, by the doing of the very thing which the franchise of complainant's corporation, as a matter of law, permits the city to do, it lessens in some degree, the opportunity of complainant to enjoy its franchise as it did before the city constructed its own railroads.

A municipality has the power as against the franchise of a water company, to furnish water to its own inhabitants, and thereby greatly, if not wholly, destroy the investment of a water company, and this, because the franchise did not exclude the city. But the city, with the same character of franchise granted to a railway corporation, counsel would say, can not undertake that which the non-exclusiveness of the franchise of the railway corporation permits the city to do, viz: furnish transportation to its inhabitants, because it will interfere in greater or lesser degree with the physical operation of the company's roads and cause inconvenience to passengers desiring to take the company's cars, resulting, in some instances, in loss of patronage to the company. We assert that this distinction is not supported in reason or sound law.

The principles upon which complainant draws to establish its proposition, as we have already stated, are those applied in cases involving the rights of abutting property owners and where the actual portion of the street occupied by a prior company is attempted to be invaded by a later company. On pages 23 to 77 of complainant's brief numerous cases of the character just described are cited and referred to by counsel. By a careful culling of sentences and phrases from those decisions they have ingeniously woven excerpts apparently establishing principles in support of their contention. It is unfortunate that counsel in citing these cases have refrained from citing the facts of the par-

ticular cases in which they were found. If they did it would at once become obvious to the court without recourse to the books that the courts were dealing in these cases with subject matters entirely different from this case, and as to which fundamental principles of the law can now be said to be fairly well settled. Time will not permit us to analyze the facts and subject matter of each case cited by counsel. We stand upon this proposition that with the exception of the Omaha case those excerpts are taken from cases of the character above described. Three examples will suffice.

Counsel have frequently referred to the case of Hamilton Traction Co. *vs.* Hamilton Transit Co., 69, Ohio State 492, 69 N. E., 991-994. Excerpts therefrom are found on pages 27, 37, and 45 of complainant's brief. An examination of that decision, and particularly the map showing the proposed construction of the tracks of the two companies, found on page 992, 69 N. E. Reporter, shows that the second company attempted to construct its tracks in the same space in the street occupied by the tracks of the first company. The doctrine announced in that case is found in the language of the court itself:

> "The right which the grantee acquired by such grant (that is the grant to construct and operate a street railroad on a street) is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public; and where, as is this case, there are conflicting claims asserted by rival companies each claiming the same location under grant from the city authorities, and for the same character of use, such claims, even were both grants authorized, should be settled and determined by applying the rule that the first of said grantees to rightfully occupy the street has the superior and better claim to right thereto."

Nothing can be found in the case to justify the assertion that if the second company had not sought to invade the same portion of the street occupied by the first one, but used other portions of the street, the same rule would have been applied. On the contrary the opposite clearly appears, the franchise was not exclusive and it was the invasion of the same portion of the street which made the acts of the second company unlawful.

On page 64 of complainant's brief, counsel cite the case of Pittsburgh, Virginia, and Charleston Railway Co. *vs.* Vance 115 Pa., 325, 18 Atl., 764, and by selecting one paragraph from the opinion, claim support from that case for their contention. The facts of that case were these. The railroad company condemned a right of way over a farm of ninety acres upon which in addition to the farm building, a mill was situated and operated by the owner. Evidence was introduced showing that access to the mill was therefore greatly hindered, and passage thereto and therefrom rendered dangerous, resulting in loss of patronage. The court, when using the language found in complainant's brief, was discussing the admissibility of that evidence. In the sentence following the excerpt quoted in complainant's brief this language is used:

> "But the testimony was relevant *only* as it might tend to show that the loss of custom detracts from the *value of the land and to what extent*, for if the plaintiff might recover for the loss of custom as a *specific item* of claim, he might under certain condition, recover beyond the value of the land, and this would be at variance with all the cases."

The court was dealing with a principle well established in the law of eminent domain, that when property is taken not only must the owner be compensated for the land actually taken but also the damage done to the remaining portion by the severance and the inaccessibility produced by the use of the condemnor of the part condemned.

Again on page 62 of their brief, counsel refer to Vincent Brothers *vs.* New York R. Co. (1904) 77 Conn., 431; 59 Atl., 491, and quote a single sentence therefrom in support of their theory. In that case, a steam road, required to change the grade of its tracks by legal authority, closed the street on which Vincent Brothers were engaged in the business of selling grain, constructed temporary railroad tracks almost against the property of plaintiff, and operated a steam railroad thereon. The action was to recover damages caused by the interruption of access to plaintiff's building and loss of profits and trade to which they unquestionably were entitled. The distinction between that case and the case at bar is at once apparent.

The courts, in the foregoing cases and the other cases with the exception of the Omaha case, were dealing with two distinct states of facts entirely different from the situation in the case at bar:

First. An injury to an abutting property owner by a steam railroad cutting off access to his business and property, either by the construction or operation of the road in a public street:

Second. The damage done to the remainder of a tract of land through the condemnation of a part of the tract not only by depreciating the value of the remainder by reason of the severance but also by reason of the use to which the condemned portion is to be put.

Third. The interference caused by one railroad occupying the same space in the street actually occupied by another road.

The law is well settled, which we have heretofore demonstrated, that an abutting property owner has no right to complain of the use of a public street for street railroad purposes. This is said to be an ordinary use of the street and not inconsistent with the purposes for which streets are laid out. This, however, is not the rule where a steam railroad seeks to use the public street. Such use is not an ordinary use, and abutting property owners have the right to com-

plain. Unquestionably the construction on Market street of the tracks of the United Railroads causes interference, more or less, with access to and from business property on the street. The construction by the municipal authorities of additional tracks on the street unquestionably causes a greater degree of inconvenience to such access to abutting property. But property owners under the firmly established rules of law cannot complain, and they are not entitled to damages.

Assume, as is the fact, that on the south side of Market street there is a large department store known as "The Emporium" which draws patrons and customers from all over San Francisco.

Were there no street railroads at all upon Market Street, access to and from the Emporium would be more convenient and easy than if there was one. If there were two railroads upon Market Street, access to and from the Emporium would be less convenient than if there was one. And the very construction of two additional tracks on Market Street might even deter timid people from patronizing this particular store. Although the owners of that property have a peculiar interest in the street, and the great value of their property depends upon the fact that it abuts upon this important street, nevertheless they are not entitled to damages because of this inconvenience of access to their property. Why, therefore, should the law be more tender of a private company which has been granted a privilege that it could not possess except by permission of the city, to operate a street railroad for the public convenience, than it is of a property owner whose property abuts upon the street, and in which he has an inherent and vested right by virtue of that very ownership? It is submitted that if any difference exists between these two respective rights, it should be to confer upon abutting property owners greater protection against interference with their access to and from their property than to railroad companies against interference with access to and from their cars operated under a franchise.

The rule governing one road occupying the same space occupied by another road seems to us to rest upon clear legal foundation and is entirely logical. The company is granted the right to operate its cars in a particular portion of the street. Here is a direct physical invasion of the easement of the railroad company, and it is for this reason that the courts have protected the prior company from a subsequent company's utilizing the same space. Reason and logic and the rules of law established in somewhat analagous cases can be brought in support of that doctrine, but the principle cannot be extended to embrace interference with access to cars of a company operating on an inner track which normally and unavoidably occurs from the operating by a competing company of cars on an outer track.

IV.

Appellant's Franchise Was Not Exclusive and Never Became Exclusive Either in Whole or in Part.

A very ingenious argument is sought to be evolved by appellant from section 5 of its franchise and section 499 of the Civil Code of California. While tacitly conceding that the city could not grant an exclusive franchise, and that it did not do so to appellant, the legal fiction is created, because of the law existing in California at the date of the franchise, that appellant acquired something which could not be directly given to it. This something is rather interestingly designated a *pro tanto* franchise, and the pages of the brief of the appellant are sprinkled with "*pro tanto*" until appellant's insistence upon the refrain becomes rather confusing. This partial exclusive franchise, granted in defiance of the powers of the city and in violation of the law of the State, is described by appellant to subsist in the streets described in its charter for the excess over five blocks. It is suggested that this exclusiveness comes from two sources:

First, section 5 of the franchise; and, second, section 499 of the Civil Code. Section 5 but writes into the franchise, and this by specific reference, section 499 of the Civil Code. Of course, by thus incorporating in the franchise a part of the law of the State of California, the rights granted by the franchise are neither diminished nor increased. *The franchise* of appellant is changed neither in character nor extent.

If the scrivener who drew the particular instrument had seen fit to insert in it that it should be lawful for the City of San Francisco to do all things permitted by the laws of the State of California, he could have accomplished no other result than the law itself, unwritten in the specific instrument, accomplishes. Indeed, a more satisfactory explanation for the insertion of section 5 in the franchise would seem to be an intention of the parties to make perfectly clear that they were not dealing with an exclusive franchise.

The power was in the State of California. From its reservoir of power the State conferred upon the city of San Francisco the right to grant franchises. The State did not thus exhaust its reservoir of power. It did not give absolute and complete dominion of streets to the city. It imposed a limitation which Judge De Haven, in *San Jose vs. San Jose*, 156 Fed., 458, says was for the convenience of the public. The State retained full jurisdiction over its limitation, with which it had never parted—did so for the welfare of its people generally. The benefit accruing the appellant takes to itself. The matter, however, embraced in the limitation as set forth in section 499 was one between the State of California and its people—between the State, if you choose so to put it, and its municipalities. It was not in reality a contract between the State and franchise holders. It is true that for the time being, and only for the time being, for the convenience of the public, the State prescribed a limitation upon the use of streets, always retaining its full jurisdiction and authority over this limitation, which remained, reserved in its reservoir of power. The appellant, in common with all others of California, was governed by the State's enactment;

but the appellant, like all others, was governed by the State, and at all times was subject to the State's determination of what was most advantageous for the public welfare.

The position of the appellant has shifted somewhat. In the lower court appellant argued quite as ingeniously and quite as persuasively as here that its contract was with the State of California, and, because of that fact, section 499 had given to appellant what it terms a *pro tanto*, exclusive franchise. The error of the position of appellant is that its franchise today is the same franchise which was given to it in 1879. The *franchise* has not been changed or modified in any degree. The general law of the State, for the convenience of the people, could not be frozen into unchangeable fixidity by the franchise of appellant. The franchise continued exactly the franchise granted. The general-welfare law remained such only so long as the legislature, in its wisdom, believed it ministered to the general good.

Writing section 499 into the franchise, unless done upon the theory suggested of making plain that the parties understood full well that no exclusive franchise could be granted, may be fairly inferred as rather an idle act. Of course, if any rights accrued to the appellant under 499, those rights would be unaffected by the manner in which that section should be written in the franchise. Bearing in mind that section 5 of the franchise states "it shall be lawful" for the city to grant an additional franchise for five blocks, assume that within the ensuing few years after the date of the franchise the legislature of California had seen fit to amend section 499, and changed by the amendment the number of blocks mentioned in that section from five to two. With this later law in force as a general law of the State of California, let us assume that the city of San Francisco undertook, in accordance with section 5 of the franchise of the plaintiff, to grant to another corporation a franchise for five blocks of the streets covered by plaintiff's franchise. Is it possible to imagine the appellant, under such circumstances, asserting that section 5 constituted a

contract between the city and appellant, and therefore appellant, standing upon this contract, recognized the validity and the legality, notwithstanding 499 of the Civil Code forbade it, of a grant of five blocks covered by its franchise? If section 499 were changed so that it read "two blocks" instead of five, could the city of San Francisco, under section 5 of the franchise of plaintiff, grant a franchise for five blocks in the city of San Francisco on streets covered by appellant's franchise?

If we were without judicial determination of the character of Section 499 of the Civil Code of the State of California, we might follow with more patience and greater tolerance the bizarre argument of appellant. But the Supreme Court of the State of California, as stated, in the opinion of Judge Hunt, has construed the Section as a limitation, and the Federal Court presided over by one of the most distinguished of Californians, Judge De Haven, has interpreted it as a statute for the protection of the public from inconvenience. The statute, of course, was regulatory in character. It comes within that extensive category of laws designed to promote the public welfare. It is indeed a police regulation. In the earlier pages of this brief this phase of the case has been discussed and many authorities cited. So numerous have been the adjudications, particularly in late years, of this court that it would be a work of supererogation to deal at length with the general principle or to cite in detail the authorities. The law has been variously stated by text-writers, but ever with increasing favor as the complexities of modern society have multiplied.

It has been said that the power to regulate the use of streets for railway purposes is a persistent power, inherent continuously in the city government and one council cannot, by exercise of the power, deprive succeeding councils of the power to exercise it again when found necessary. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police

power resident in the State as an inalienable attribute of sovereignty. It is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public and this is especially true of the police power, for it is incapable of alienation. Restrictions upon the police power are those only which are to be found in the fundamental law, for the authority of the legislature in the exercise of this prerogative cannot be limited or controlled by the action of a previous legislature or by the provisions of contracts between corporations or individuals. It follows, of course, that corporations take their rights and privileges subject to this general power which permanently resides in the State.

In closing this particular portion of the argument we refer to a few of the decisions of this court: *Wheeling and Belmont Bridge Company vs. Wheeling Bridge Company*, 138 U. S., 287, where it is said:

> "Nor did the charter of the defendant contain any inhibition upon the State to authorize the establishment of another bridge within the distance claimed whenever the public interests should require it. An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions. As was said substantially in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, 548, whenever it is alleged that a State has surrendered or suspended its power of improvement and public accommodation on an important line of travel, along which a great number of persons must daily pass, the community has a right to insist that its surrender or suspension shall not be admitted, in a case in which the deliberate purpose of the State to make such surrender or suspension does not appear.

Chicago and Alton R. R. vs. Tranbarger, 238 U. S., 67:

In referring to the duty of a railroad to construct certain necessary improvements, Mr. Justice Pitney, speaking for the court, says:

> "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no other person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (*Munn vs. Illinois*, 94 U. S., 113, 134; *Hurtado vs. California*, 110 U. S., 516, 532; *Butterfield vs. Stranahan*, 192 U. S., 470, 493; *Martin vs. Pittsburg, &c., R. R.*, 203 U. S., 284, 294); so an immunity from a change of the general rules of law will not ordinarilly be implied as an unexpressed term of an express contract. See *Gross vs. United States Mortgage Co.*, 108 U. S., 477, 488; *Pennsylvania R. R. vs. Miller*, 132 U. S., 73, 83."

And the learned Justice then adds:

> "(3.) But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due-process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property.
>
> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line vs. Goldsboro*, 232 U. S., 548, 558, and cases cited. And it is also settled that the police power embraces

regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. Southern Ry. vs. Ohio*, 173 U. S., 285, 292; *C. B. & Q. Ry. vs. Drainage Commissioners*, 200 U. S., 561, 592; *Bacon vs. Walker*, 204 U. S., 311, 317."

And again on page 78 it is said:

"And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment. *Chicago, Burlington, &c., R. R. vs. Chicago*, 166 U. S., 226, 255; *New Orleans Gas Co. vs. Drainage Comm.*, 197 U. S., 453, 462; *C., B. & Q. Ry. vs. Drainage Commissioners*, 200 U. S., 561, 591."

In the still later case *Hadacheck vs. Los Angeles*, 239 U. S., 394, Mr. Justice McKenna, delivering the opinion of the court, in reference to the police power, says:

"We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many cases cited by petitioner in which it is decided that the police power of a State cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & Alton R. R. *vs.* Tranbarger, 238 U. S., 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."

Let us picture for a moment the mystic maze into which the argument for appellant leads us:

a. Appellant's franchise was exclusive *pro tanto,* it says, but in result practically and wholly exclusive, because of section 499.

b. Appellant's franchise was substantially exclusive because any other railway upon the streets covered by appellant's franchise, and this is so, whether the other railway be a single or double track railway, would embarrass its operation or interfere with access to its cars. Any railway operated on tracks parallel to appellant would of necessity do these very things, therefore none other could be operated.

Appellant has then in the last analysis in reality received by its charter from the city of San Francisco two exclusive franchises, or a franchise two-fold exclusive. And all this has come to appellant notwithstanding the city could not grant an exclusive franchise. The astonishing paradox confronts us, therefore, of a lack of power to grant exclusive franchises which has resulted in a two-fold exclusive franchise.

And this, too, has arisen when the public development and the progress of the city of San Francisco require and demand exactly what the city here seeks to do. This case, according to appellant, therefore presents not what Mr. Justice McKenna describes "that private interests in the way of the march of progress must yield to the good of the community"; but it presents substantive law, the welfare of the people, the development of the city, and modern progress all yielding to unsubstantial interpretation and shadowy implication.

In conclusion, we quote from the opinion of Mr. Chief Justice Taney in the celebrated case of *Charles River Bridge vs. Warren Bridge et al.,* 11 Pet., 420, a case which has stood

as one of the landmarks in the judicial history of this country since it was decided, in 1837:

> "When a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations.
>
> * * * * * * *
>
> "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depend on their faithful preservation."

Respectfully submitted,

HIRAM W. JOHNSON,
GEORGE LULL,
City Attorney of San Francisco;
JOHN J. DAILEY,
Ass't City Att'y of San Francisco,
Counsel for Appellees.

Office Supreme Court, U. S.
FILED
MAR 27 1919
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 282.

UNITED RAILROADS OF SAN FRANCISCO, APPELLANT (COMPLAINANT BELOW),

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL., APPELLEES (DEFENDANTS BELOW).

REPLY OF APPELLEES TO SUPPLEMENTS TO BRIEF FILED BY APPELLANT.

This case was argued orally Tuesday, March 25th. Sunday evening, March 23d, counsel for appellant presented to counsel for appellees a proof of what was designated "A Summary of Local Law Respecting Matters Involved in the Issue Concerning the 'Taking' and 'Damaging' of Property"; on Monday, March 24th, another document, designated an "Outline of Argument for Appellant"; and on Tuesday, the day of the oral argument, certain emendations and corrections of this later "Outline." At the oral argument the appellees were granted by the court seventy-two hours in which to present a response.

The only importance which attaches to the matter which was thus presented by appellant is in its change of theory, quite at variance with its presentation in the court below or in its opening brief, that the law of the State of California concerning street railroads is peculiar unto itself, and that under the decisions of the Supreme Court of California a right of action different from that accorded by other jurisdictions accrues to the appellant against another company maintaining upon the same streets with appellant an additional street railway. This we deny. The authorities cited by appellant do not by any means establish this novel proposition, as a casual examination clearly demonstrates.

Apparently the leading case referred to by appellant is the *Appeal* of *N. B. & M. R. R. Co.*, 32 Cal., 499. This, however, was an assessment and a taxation case, wherein the Board of Supervisors was authorized to widen a certain street and "assess the expense of the work upon the owners and occupants of houses and lands, railroad corporations, and companies that might be benefited thereby." In the course of an extensive discussion as to whether or not a railroad would be benefited, the court uses various expressions indicating that for the purpose of assessment and taxation the property of a railroad company may be regarded as possessing the attributes of certain other kinds of property, but this is all that is decided.

The opinion merely holds—

> "That in those States where no special provision is made for taxing this species of property in a different mode it is assessed as real estate in the same manner and upon the same principles as land,"

and that its estate is subtantially of the

> "same kind and of equal dignity before the law with the estate of an abutting owner."

This does not mean that there is in the State of California a law *sui generis* in relation to the easements of street

railways. It is but the announcement of the rule, which can be found in every State and in every text book, that

> "Estates in franchises are said to rest upon the same principle as estates in land."

Authorities could be multiplied indefinitely in support of this general principle.

Los Angeles Pacific Co. vs. Hubbard, 17 Cal. App., 650, is of like character with the principal case. It involved assessment and taxation to provide cost of a proposed improvement of property located within certain boundaries.

Neither case holds, and of course it is not the law, that the railroad company owns in fee a part of the street. In California, as elsewhere, it has but an easement. That this easement is property, and for the purposes of taxation it may be assessed as an estate in land, may readily be conceded. But it is a far cry from this to the claim that the railway company may assert as against the general or the traveling public, or as against those using legally the remaining portions of the street, an absolute ownership which would enable it to dictate the specific uses of the highway.

California has decided the relative rights of street railway companies and the public in the street, in *Market Street Rwy. Co. vs. Central R. R. Co.*, 51 Cal., 583, and for the convenience of the court we repeat the very brief decision:

> "The maintenance of horse-railroads, and running of cars upon the public streets of the city of San Francisco designed for the carriage of passengers, is a mere specific mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street, nor does it prevent the crossing of its track by another railroad maintained for a similar purpose, provided the crossing is effected with as little damage as may be."

It will be observed that the attorneys for the appellants in that case, page 585, denying the rule, cite to the Su-

preme Court the principal case, the *Appeal* of *N. B.* and *M. R. R.*, 32 Cal., 510,

> "As to the nature of the interest and estate secured to the plaintiff under these franchises,"

and assert:

> "Where lands are already dedicated to a public use they cannot be appropriated to a similar use by a second appropriator."

It is obvious that if under the leading case in the 32 Cal. Reports a street railway company obtained a right of property in the street which, *for all purposes*, is to be considered real estate and the absolute property of the company, the decision in *Market Street R. R. Co. vs. Central R. R. Co.* could not have been rendered.

In a late California case the Supreme Court defined "street railway," and while the definition is not particularly illuminating, it gives to us something of the view of our court of last resort in this respect:

> "Our own court in *Board of Railroad Commissioners vs. Market Street Rwy. Co.*, 132 Cal., 183, quoting with approval the case of *Bloxham vs. Consumers, etc., Co.*, 36 Fla., 539, uses this language: 'The term street railroad applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed, compared with commercial railroads, which carries no freight but only passengers from one part of a thickly populated district to another in a town or city and its suburbs.' "
>
> *Simoneau vs. Pacific Electric Rwy.*, 159 Cal., 499.

And again, our Supreme Court has said:

> "The streets of a muncipality are for the use of the traveling public and the right of a street car com-

> pany is only to use them in common with the public. The fact that a company has been granted a right to lay tracks and operate cars along the streets gives it no exclusive right to travel even over that portion of a street covered by its tracks."
>
> *O'Connor vs. United Railroads,* 168 Cal., 48 (1914).

Again:

> "The dedication of a street to public use authorizes any ordinary use for street purposes, and the use of a street in a city or town for the tracks of a street car company is of this class and is therefore authorized."
>
> *Finch vs. Riverside, etc., Rwy. Co.,* 87 Cal., 598.

We have cited these few cases solely for the purpose of indicating to the court that the rule in California in regard to street railways is no different from that prevailing in the other States of the Union.

The permission to file a response to the new authorities presented by appellant was asked because it was thought possibly in our research certain apt cases had escaped us which appellant at the last moment had discovered and brought to the attention of the court. We have carefully examined every new case thus presented by appellant and we have failed to find any which substantiate the views of appellant or alter in any degree the arguments in the brief of appellees. No good purpose, therefore, would be accomplished by transcribing here these various cases in detail. None of them is really applicable to the case at bar.

There is nothing unique about the constitution of the State of California. The provision in relation to the taking or damage of property is in the constitutions of many States. This, of course, is familiar to the court. There was brought to our attention a case from Mississippi holding eminent domain to be unnecessary by one railway company against another under the constitutional provision that property can-

not "be taken or damaged for public use except on due compensation first made," and where the Supreme Court of that State says that a railroad company does not own the streets along which its tracks are laid.

> "The only right it can acquire in the streets of a municipality is the right to locate its tracks along or across them subject to the right of the public to continue the free use thereof for traveling, and to the right of the municipal authorities to grant similar easements therein."
>
> *Mississippi Central R. R. Co. vs. Hattiesburg Traction Co.*, 67 Southern, 897.

It is respectfully submitted that the judgment should be affirmed.

HIRAM W. JOHNSON,
GEORGE LULL,
City Attorney.
JOHN T. DAILEY,
Assistant City Attorney,
Attorneys for Appellees

WASHINGTON, March 26, 1919.

UNITED RAILROADS OF SAN FRANCISCO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 282. Argued March 25, 1919.—Decided April 21, 1919.

A general law, in force when a street railroad franchise was granted by a city, provided that in no case must two railroad corporations occupy and use the same street for more than five blocks; and the franchise ordinance, referring to the law, expressed a like limitation on the power of the board of supervisors, as to the streets covered by the franchise. *Held*, that the limitation was not intended to affect the city when constructing a street railroad of its own under a later amendment of the law and of the state constitution. P. 519.

Held, further, that the grantee took the risk of this judicial interpretation of its franchise and of the city's railroad being run in the same streets on either side of its own, and that any damage inevitably resulting was not a taking of its property requiring resort to eminent domain. P. 520.

Semble, that the damage referred to in the California Constitution of 1879, Art. I, § 14, requiring compensation before private property is taken or damaged for public use, is such as results from conduct that would be tortious unless under eminent domain proceedings or some law authorizing it on condition that damages be paid. P. 521.

The plaintiff having failed to establish its right to enjoin the construction of the city's railroad alongside its own, as a violation of franchise rights and taking of property, and the road having been built *pendente lite*, and the right to recover for any damage due to track-crossings, manner of operation, etc., being doubtful, non-equitable in character and dependent on the taking of new evidence—*Held*, that a decree dismissing the bill should be affirmed, without prejudice to further proceedings to recover any damage to which plaintiff might be entitled. *Id.*

The charter provision requiring the City of San Francisco to consider offers for the sale of existing public utilities before constructing new ones affords no ground for a street railroad company to oppose construction of a municipal road alongside its tracks, when such company, in common with others, had received from the board of supervisors a general solicitation for such offers as to any existing street railway. P. 522.

239 Fed. Rep. 987, affirmed.

THE case is stated in the opinion.

Mr. Garret W. McEnerney, with whom *Mr. William M. Abbott*, *Mr. William M. Cannon* and *Mr. Andrew F. Burke* were on the briefs, for appellant.

Mr. Hiram W. Johnson, with whom *Mr. George Lull* and *Mr. John J. Dailey* were on the briefs, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellant to prevent the construction of a municipal street railway on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double track, for more than five blocks, and also to prevent the inci-

dental cutting of the plaintiff's tracks. The appellant claims the right by grant and contract to forbid the proposed action and relies upon the Constitution of the United States, upon the state constitution which provides that private property shall not be taken or damaged for public use without just compensation having first been made, and upon Article XII, § 2 of the charter of the city, requiring it to consider offers for the sale of existing public utilities before constructing new ones. The answer denies that damage to the plaintiff will ensue from the new tracks and denies as matter of law that the plaintiff has the contract or property rights alleged. On application for a preliminary injunction the District Court held that the plaintiff had failed to make out a case for it, and denied it, intimating an opinion against the plaintiff upon the matter of law involved. It then entered what is called a final decree, denying all relief to the plaintiff with costs to the defendant. 239 Fed. Rep. 987. The present appeal is from that decree.

The franchise of the plaintiff to maintain its two tracks on Market street was granted to its predecessor in title in September, 1879. At that time by § 499 of the Civil Code of California, "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks." The existence of this general law is the first ground relied upon for the assertion of exclusive rights in the street by the plaintiff. The other ground is the order of the Board of Supervisors of San Francisco granting the franchise, and especially § 5 which is as follows: "It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and

conditions specified in the 499th section of the civil code of this State. This section shall apply to persons and companies, as well as corporations." We agree with the District Court that these sections did not give to the plaintiff the right it claims.

The section of the Code would seem to be a limitation of the powers conferred upon the Board of Supervisors by that and the adjoining sections, not a contract by the State, or an authority to the Board to contract, against a larger use of the streets. It most naturally is read as merely a general law declaring the present legislative policy of the State. *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, 292; *Williams* v. *Wingo*, 177 U. S. 601; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387; *San Jose-Los Gatos Interurban Ry. Co.* v. *San Jose Ry. Co.*, 156 Fed. Rep. 455, 458. But however this may be neither that section nor § 5 of the order granting the franchise purports in terms to prevent the city from itself establishing a parallel road. If it be true, as the plaintiff argues, that the grant or contract in § 5 of the order means what the statute means and is to be construed by that, we have suggested what seems to us the natural construction of the act. But in any event it is decided by *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, that a covenant by a city not to grant to any other person or corporation a privilege similar to that granted to the covenantee does not restrict the city from itself exercising similar power; and it is assumed in that case, that the principle already is established as to legislative grants. 200 U. S. 34. That is the assumption also of an amendment of § 499 by an Act of April 24, 1911. [Stats. 1911, c. 580.] The city now is given power to establish and operate transportation service by the amendment of § 499 just mentioned and by the constitution of the State. Article, XI, § 19. Amendment approved October 10, 1911. The plaintiff took the risk of the

judicial interpretation of its franchise and of this possible event. *Madera Water Works* v. *Madera*, 228 U. S. 454. Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain.

We understand that the municipal road now has been built, and the question is whether to retain the bill for a claim of damages. But as that would require new evidence and practically would present a new case, and as further, with such light as we now have, the right to damages seems at least doubtful, we deem it sufficient if the rights of the plaintiff, if any, in that regard, are reserved. The question is raised pointedly by Article I, § 14, of the Constitution of 1879. That provides that "private property shall not be taken or damaged for public use without just compensation having first been made," &c. The plaintiff seems to argue that this section entitles it to preliminary compensation for any considerable pecuniary detriment that the city may inflict by the establishment of the new road, however lawfully it may act. Courts and judges have differed widely in their interpretation of this class of provisions in statutes of different sorts; but we should suppose, until otherwise instructed by the Supreme Court of the State, that the damage referred to in this section of the state constitution in the main would be damage resulting from conduct that, like taking, would be tortious unless in proceedings under eminent domain or some law authorizing it on condition that damages be paid.

As to crossing the plaintiff's tracks we are inclined to agree with the District Court that the plaintiff's franchise must be understood to be subject to this incident and that a taking by eminent domain was not necessary. *Market Street Ry. Co.* v. *Central Ry. Co.*, 51 California,

583. *Consolidated Traction Co.* v. *South Orange & Maplewood Traction Co.*, 56 N. J. Eq. 569, 574, *et seq.* 3 Dillon, Municipal Corporations, 5th ed., § 1241, p. 1983. If we are wrong and if the crossings or the manner of operating the parallel tracks should give or has given rise to any claim, the decree will be without prejudice to such claim. We assume in accordance with the plaintiff's evidence and argument that the damage may be considerable and we think it just to leave open whatever can be left open, but at present we cannot say that the loss is or will be of such a character that it must be paid for, and we are satisfied that it is not such as to call for equitable relief.

A general solicitation of offers for sale to the city of any existing street railway in San Francisco was passed by the Board of Supervisors and was ordered to be sent and was sent to the plaintiff, among others. We agree with the District Court that Article XII, § 2 of the City Charter does not better the plaintiff's case.

Decree affirmed without prejudice to further proceedings to recover any damages to which the plaintiff may be entitled.